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THE RHODE ISLAND CONTROVERSY.

The case of *Ives* v. *Hazard*, reported in 4 Rhode Island Reports, p. 14, appears to the eye of the reader of that excellent volume, as a not unusual suit for specific performance of a written contract; but since it was decided by the courts, its merits have been very much discussed in the State in which it was made. Much zeal and interest have been excited on either side; the General Assembly has been occupied with its consideration in various forms; speeches and pamphlets have been read and written about it, and it has threatened to become as celebrated in politics, at least within the borders of Rhode Island, as the well-known Dorr controversy was in its day, though with much less foundation of truth and right to sustain it. For these reasons, we have thought that a narration of the case, as presented in court and to the public, might be interesting to our readers, as it may fairly be considered one of the curiosities of litigation.

On the 28th day of May, A. D. 1852, Mr. Robert H. Ives, of Providence, received from Mr. Charles T. Hazard, of Newport, Rhode Island, the following memorandum:

"Mem. 28th May, 1852. I agree to sell R. H. Ives, the Peckham farm now occupied and owned by me, say about forty-five acres in Newport, for the sum of fifteen thousand dollars, ($15,000) payable 25th March, 1853, when possession is to be given, he, R. H. I. paying the annuities for December, 1852. CHARLES T. HAZARD."

Early in the fall of 1852, Mr. Ives, having ascertained that Mr. Hazard had contracted to sell certain portions of the Peckham farm to other persons, laid the above memorandum before counsel, with instructions to take the proper measures for the protection of his rights. A bill in equity was forthwith filed, setting forth the contract, and praying for a specific performance, and for an injunction against the sale of any portion of the land. A temporary injunction was granted without opposition, and, in the course of time, answers and replications were filed and proofs taken. The only serious question raised in the case, was between Mr. Ives and Mr. Charles T. Hazard, as it was found that neither of the intended purchasers had received any deed or paid any consideration for the land for which they had respectively contracted. We quote the material parts of Mr. C. T. Hazard's answer, of which no abstract can easily be presented. After giving an account of an interview between himself and Mr. Ives at the counting-room of the latter, the answer proceeds:

"And defendant started in haste for the boat, and complainant took his hat and walked with defendant from complainant's counting-room towards the steamboat, in great haste; that while so walking over to the boat, complainant again referred to said land, and asked the defendant what he would ask for the whole of it, and defendant again replied that he would not sell the whole of it; that he bought it for the purpose of making a home for himself and family to live on, and that his, defendant's, wife would never consent for him to sell the whole of it; that defendant repeatedly stated this to the complainant in the most distinct and decided manner; that the defendant well recollects that he was so explicit in this to the complainant, because he had, at a prior time, sold some real estate in Newport, and the contract was completed and the purchaser had, on the faith of said purchase, made contracts, and when defendant stated what he had done to his wife, she absolutely refused to sign any conveyance of it, although defendant tried to induce her in good faith to do so, and the contract was obliged to be given up and abandoned, by reason of her refusal to join in any conveyance thereof."

"That while so walking along with said complainant, defendant did say to him, complainant, that if he, defendant, was going to sell the whole, he should ask not less than fifteen thousand dollars for it; that when the defendant said this, complainant started, and said he was amazed at such a sum; that it was perfectly ridiculous, and that he should never think of such a thing; these being the very words used by the complainant, as this defendant recollects and believes, and the substance and purport, as he knows and on oath declares; that by this time, they had nearly arrived at said steamboat, and after the last above, the subject was dropped, and they arrived at the wharf just as the boat was about leaving; that defendant stepped to the boat and turned to take leave of the complainant, the boat being then just on the point of starting from the wharf, and complainant took a little sort of a book from his pocket and hastily wrote something

in it with a pencil, resting it on the taffrail of the boat, just by the gangway, where complainant was then standing, in order to be ready to step ashore as the boat started, and hastily turned the book round on the taffrail to the defendant, and said: "Just put your name there, as a mere memorandum."

"And defendant avers that he wrote his name in pencil in said book, as requested, and as and for a memorandum merely, of the talk between the parties, as herein before and herein after more in detail expressed; and he asserts and avers that he never wrote it there as and for his signature to any contract of any kind, either binding on him or on said complainant, and that he so, as aforesaid, wrote his name mechanically and without reading what complainant had written, without its being read to him, and without knowing what complainant had written, and that on account of the haste and the confusion, he had no opportunity to read it, complainant instantly taking up said book off the railing and stepping ashore with it, if complainant was not, as defendant thinks, then standing on the cap-log of the wharf — the plank being then just hauling, or hauled in."

"And said defendant unequivocally avers, that at the time, he did not think, understand or believe that complainant was writing anything which he, complainant himself, understood or thought to be a contract between them, and this defendant did not understand the complainant as asking him, defendant, to write his name, or in any wise asking him, defendant, to sign a contract of any land binding on either of them. And defendant avers that he so wrote his name as to a mere memorandum, as aforesaid, and that he did not write it there as and for his signature, to any contract of any kind; and he avers that he never delivered any paper with his name written thereon to said complainant as and for a contract for the sale of said land. And the defendant avers that at the time of so writing his name, he did not have the idea or intent of making any contract thereby in his mind.

"And defendant avers that if, at the said time when he wrote his name, he had supposed, understood or believed that in so doing, he was so signing his name to a contract, or if he had supposed, understood or believed that the complainant thought, or considered that he, said defendant, was so writing his name as to and for a contract, he, this defendant, would never have so written his name there. And defendant avers, that in his conversation with complainant, immediately before so writing his name, and previously, he had always and often, and without variation, expressly told complainant that he would not sell without the previous assent and approval of his wife; and all this, complainant perfectly well knew; and defendant supposed and believed that said memorandum contained both said conditions, as the same were a substantial and material part of said talk. And defendant avers, that in this and all conversations with complainant, these were expressly made the basis and conditions precedent thereof, and so understood by the complainant."

That is to say: The principal defendant admits that he signed the memorandum of a contract, the specific performance of which is sought by the bill, but says it was obtained from him suddenly and by surprise, and that it was expressly made conditional upon the consent of his wife.

In support of these defensive allegations of haste and surprise, and of a condition not named in the written mem-

orandum, the defendant offered no proof. The complainant, to show that these allegations were without any foundation in fact, offered the deposition of his brother, Moses B. Ives, from which we extract all that is material:

"1st Interrogatory.—Have you, at any time, heard any conversations between the said Robert H. Ives and the said Charles T. Hazard, in relation to the purchase of any land by the said Ives of the said Hazard? If so, when and where, and in relation to what land? State fully the conversation.

Answer. — I heard a conversation between the parties at two different periods of time. One, the first, at Newport, in the month of November, 1851. The next I heard in Providence, the latter part of May, 1852, and the land in question was about forty-five acres, I think, belonging to Mrs. Peckham. The first conversation, in November, 1851, was in relation to the purchase of this property by Mr. Hazard, as agent for Mr. Robert H. Ives; at which time Mr. Hazard told Mr. Robert H. Ives he thought this property might be purchased for about twelve thousand dollars. Mr. Robert H. Ives at that time authorized Mr. Hazard to offer ten thousand dollars for that property. Mr. Hazard said he thought he could buy it cheaper than any other man, but he did not think he could get it at that price; still he would offer it. The next, or another, conversation occurred in the latter part of May, 1852, in Providence, when Mr. Hazard, in the forenoon of the day, in the latter part of May, called at the counting-room of Brown & Ives, and told Mr. Robert H. Ives that he had purchased the land in question, but did not name the price that he had agreed to give for it. Mr. Robert H. Ives expressed his surprise to Mr. Hazard, that before purchasing the property, he had not communicated with him, (Mr. Ives,) so that he (Mr. Ives) might increase his offer, if he thought proper so to do. Mr. Ives went on to ask Mr. Hazard if he would sell him (Mr. Ives) that property, and if so, at what price. Mr. Hazard replied that he did not wish to sell the whole, but would do so, if price enough should be offered, or words to that effect. I do not remember the precise words. That his wife did not wish to sell the whole. After considerable conversation between the parties, Mr. Robert H. Ives urged Mr. Hazard to name a price for the land in question. Mr. Hazard hesitated a moment or two, and then said, If I sell you this land, I must have fifteen thousand dollars for it. Mr. Robert H. Ives then asked him, "Are these your lowest terms?" "They are for the whole tract, but I will sell a part of it at a less rate," was the reply of Mr. Hazard; "but if I sell you the whole, you must pay me fifteen thousand dollars for it." Mr. Hazard, looking at the clock, or taking out his watch, (I do not remember which,) said, "I have just time to get to the boat." He then left the counting-room, and was immediately followed by Mr. Robert H. Ives, who returned in less than half an hour, and showed me a memorandum in pencil, which he said was signed by Mr. Hazard, or words to that effect. And that memorandum makes part of the bill of the complaint. That is the substance of the conversation that I heard between these two parties.

3d Int. — About how long a time did this conversation in Providence, in May, occupy?

Ans. — There were two conversations in May. One between nine and eleven o'clock in the forenoon, and one between one and two o'clock of the same day, about half an hour each."

He also offered the following letter from Mr. Hazard. In order to a correct understanding of the first paragraph of this letter, it is necessary to state that Mr. Ives already owned an estate on the Cliffs, in Newport, adjoining the Peckham farm, and that with the Peckham farm, he was desirous of purchasing a lot owned by Mr. Armstrong. Accordingly after he had contracted for the Peckham farm, he authorized Mr. Hazard to purchase for him the Armstrong lot:

"NEWPORT, June 2, 1852.

"MR. R. H. IVES — DEAR SIR: According to your request, I saw Mr. Albert Armstrong the night I returned from Providence, and finally succeeded in buying his land, at the rate of $900 per acre, to be measured — deed to be given any time between this and the first of September, one half of the purchase money to be paid when the deed is delivered, and the balance to be paid on the twenty-fifth of March next, to have possession of the land as soon as he takes the present crops off.

I am sorry to say, when I told my wife what arrangements I had made with you respecting the Peckham farm, she at once told me she would not consent to sell the whole of it. I thought I was doing what was for the best at the time; but she says she has been moved about from place to place, and has been to the trouble of furnishing the house, and has got settled, she should not be willing to break all up and move again. I told her you said we could hire the place, but she would not consent to that, and said she would not sign a deed of the whole of it, but was willing and wanted to sell a part of it, which would be the south part, even at a very low price. You will recollect, I repeated it a number of times, that she did not want to sell the whole, but a part, and I did not know what my folks would say, if I put a price on the whole of it. As the thing has taken the course it has, I think it would be well if you could come down and talk the case over with her, yourself. If you can get her willing, I am ready to go on as we talked. Under the circumstances she says she would be willing to sell the south part, running on a straight line with the north side of the Armstrong lot, east and west, for the low price of $550 per acre, making about eighteen acres.

I may be in Providence, on Saturday, on business.

Yours respectfully, (Signed) CHARLES T. HAZARD."

It was proved by two witnesses, that Mr. Hazard had admitted that Mr. Ives, at the time when the memorandum was signed, agreed to take the land, and pay the stipulated price.

Upon this state of facts we presume that our readers do not need to be informed what was the result of the case; and we think that every intelligent and fair-minded man will agree with Ex-Chief Justice Staples, of Rhode Island, when (giving his testimony in some of the subsequent proceedings that grew out of the case) he stated that he considered the decree of the court, that Hazard should specifically perform this contract, to be in strict accordance with

justice, equity, and law. Every lawyer sees at once, that such a decree was as much a matter of course, as that judgment should be entered for the plaintiff in an action on a promissory note, where the signature was admitted, and an allegation of want of consideration, unsupported by proof, had been overthrown by evidence of the payment of full consideration.

The case was orally argued; but before the decision, one judge having died, and another having resigned, it was again argued in writing, and the decision was announced at the September term of the court, 1855. The form of the decree having been settled, upon full argument, a hearing was had before a Master, to settle the amount of the purchase money, and the form of the conveyance; and upon the coming in of the Master's report, a final decree was entered, in pursuance of which Mr. Hazard executed a deed of the farm to Mr. Ives, and received the purchase money.

But what would have been the end of an ordinary lawsuit, was but the beginning of this. Mr. Thomas R. Hazard, of the same name, but distantly, if at all, related to the defendant, Charles T. Hazard, memorialized the General Assembly upon the subject of the enormous injustice which the defendant had suffered in this case; and not meeting with the success which he desired, published a pamphlet of some one hundred and sixty large and closely printed pages. It is difficult to give any description of this production within reasonable limits. It is called "An Appeal to the People of Rhode Island, in behalf of the Constitution and Laws." Its discussion of legal and constitutional questions is such as might be expected from a man who boasts that he never read a law book. Its statements of fact are such as would naturally be produced by neighborhood gossip, and stories told by defeated litigants and their friends. The burden of the book is that Mr. Ives is a rich tyrant, who has the General Assembly, the Supreme Court, the bar of the State, and the business men of Providence in his pay, and under his control; and through these, his pliant tools, he had succeeded in defrauding a poor man, with an unfortunate family, out of his small patrimony. With bad temper, and worse logic, it attempts to show that the Supreme Court of Rhode Island had no jurisdiction in equity to enforce the performance of the contract; that no contract was made; that the contract was obtained by sur-

prise; that Mr. Ives never agreed to take the land; and that Mr. Hazard had been unconstitutionally deprived of his trial by jury. All this is interlarded with abuse, either by direct charge or covert insinuation, of Mr. Ives and his counsel, of the court and the bar. This book was industriously circulated, and a large number of the people of the State received from its perusal their first and only impression of the case. It was followed by another pamphlet, written by the same author, in reply to a statement by Mr. Ives, prefixed to a separate publication of the official report of the case. This work, though quite long, contains very little new matter, but is devoted to personal abuse of Mr. Ives, and Mr. Ames, the present Chief Justice of the State.

The result has been that so much popular excitement has been created, that politicians and party newspapers have found it available, and it was seriously apprehended at one time that the General Assembly might make itself and the State ridiculous, by passing an act annulling and reversing the decree of the Supreme Court.

One of the strangest incidents connected with this case has been a petition of Charles T. Hazard to the General Assembly for redress, on account of alleged slanderous charges against him, contained in the official report of the case, *Ives* v. *Hazard*, contained in the fourth volume of Rhode Island Reports. Mr. Ames, the reporter, had inserted in the statement of facts preceding the points taken by counsel and the opinion of the court, the substance of M. B. Ives' deposition, quoted above. This statement about his having been employed to purchase the farm for R. H. Ives, and then purchasing it for himself, was the slander of which Mr. Charles T. Hazard complained. Two successive committees of the General Assembly heard him, through his counsel, Mr. Thomas R. Hazard, upon the important question, whether he was slandered by the publication of facts sworn to by a witness, whose credibility was never called in question, and used in the trial of the case, in reply to the defensive allegation of surprise set up by himself in his answer. Of course the reporter was acquitted.

The preceding statement rests upon facts proved at the trial. There are other facts, equally authentic, which have come to light since the trial. When Mr. Charles T. Hazard signed the memorandum, his wife was with him on

board the boat at Providence, and went with him to Newport. Of course, if he had made a bargain with Mr. Ives, conditional upon her consent, he had an opportunity to consult her; and yet, upon his arrival at Newport, he told a gentleman that he had sold his farm to Mr. Ives, and on the same day purchased the Armstrong lot, according to the request of Mr. Ives, well knowing that Mr. Ives only wanted that lot in connection with the Peckham farm. It seems not difficult to decide, in view of these facts, whether at this time Mr. Charles T. Hazard understood that there was any condition attached to his contract. Then one of the main defences to the bill was that Mr. Ives did not agree to take the land, when Charles T. Hazard had in his possession a letter written to him by Mr. Ives on the 4th day of June, 1852, referring to and expressly admitting "the contract entered into between us for the sale of the Peckham farm."

A petition for a rehearing was withdrawn by the defendant, after having obtained the opinion of eminent counsel that there was no foundation for such a motion.

But perhaps the most singular feature of this most singular case is yet to be told. The reader will observe that M. B. Ives swears that his brother, R. H. Ives, authorized Mr. Charles T. Hazard to buy the Peckham farm for him for ten thousand dollars. It now appears from a letter of Charles T. Hazard to R. H. Ives, written a few days after the conversation referred to in the deposition of M. B. Ives, that C. T. Hazard stated to R. H. Ives that Mrs. Peckham refused to sell the farm for ten thousand dollars, and that he had purchased it for himself at a considerable advance, to prevent its passing into other hands. This letter was for a long time mislaid. It also appears from the deposition of Mrs. Peckham, the former owner of the farm, that she did sell the farm to him for ten thousand dollars, and executed the deed; and that afterwards, at C. T. Hazard's request, she consented to agree to take five hundred dollars more, and to sign a new deed, for what reason she did not inquire, but which is quite obvious. We quote from Mrs. Peckham's deposition:

I, Julia M. Peckham, of the city and county of Newport, and State of Rhode Island, on solemn affirmation, do depose and say, in answer to the following interrogatories:

1st Interrogatory. — Where do you reside?

Ans. — In Newport, R. I.

2d Int. — Were you formerly the owner of the Easton or Peckham farm, and did you sell it to Charles T. Hazard?

Ans. — I was the owner of the said farm, and did sell the same to Charles T. Hazard.

3d Int. — Please state the bargain you made with him.

Ans. I sold the farm to Mr. C. T. Hazard for ten thousand dollars. He then, a short time after, some one or two days, requested me to go to Mr. Cranston's office; that he should add five hundred dollars to the sale of the farm if I did so. I went to Mr. Cranston's office, and the five hundred dollars was added to the sale for ten thousand. I knew nothing about his reasons for so doing, and never inquired. I was willing to take five hundred dollars more, of course.

4th Int. — Who were present when you sold the farm for ten thousand dollars, and where was the bargain made?

Ans. — I am not certain, but I think my husband was present. The bargain was made in the house next to this, in the southeast room, late in the evening, as near as I recollect; Mr. Charles Hazard may remember who was present; as near as I can remember, no one was present but Mr. Hazard, my husband, and myself. I think the bargain was made between ten and eleven o'clock in the evening.

5th Int. Who did you employ to draw the deed of the farm?

Ans. — Mr. Henry Y. Cranston.

6th Int. — When you employed him, did you state to him how much the farm was sold for?

Ans. — I don't recollect.

7th Int. Was a deed drawn by him in which the consideration was named at ten thousand dollars?

Ans. — There was.

8th Int. — Was that deed signed and acknowledged by you?

Ans. — If I recollect right, it was.

9th Int. — Before whom was it acknowledged?

Ans. — I don't remember; I think probably Mr. Cranston knows; he must have known.

10th Int. — When you went to Mr. Cranston's office to have the five hundred dollars added, was a new deed made?

Ans.— I have since understood by Mr. Cranston there was.

The result of the whole case is this: Mr. Charles T. Hazard was employed by Mr. Ives to purchase for him a farm adjoining an estate already owned by him, and authorized to offer ten thousand dollars for it. He called upon Mrs. Peckham, and purchased the farm for that sum. He took the deed, and then sent for Mrs. Peckham to go to Mr. Cranston's office to add "five hundred dollars to the sale of the farm." On the same day he wrote to Mr. Ives that he could not buy the farm for ten thousand dollars, but had purchased it for himself at a considerable advance. He then, after the lapse of about six months, called upon Mr. Ives, and sold him this farm for fifteen thousand dollars. A few months after this, the land having risen in value, he

attempted to sell portions of it; and being restrained by the court, and compelled to perform his contract, and thus to submit to the injustice of pocketing five thousand dollars as the reward of his own faithlessness and fraud, he invokes the aid of Mr. Thomas R. Hazard, and turns the State upside down; complains of having had his property unjustly taken from him; and above all, of having been slandered.

The petition of Charles T. Hazard for a new trial, is still pending. We shall watch its progress, in view of recent developments, with some interest; and in another article we propose to explain how it happens that the General Assembly of Rhode Island entertains a petition to annul and reverse a decree of the Supreme Court of the State.

Circuit Court of the United States. District of Rhode Island. June Term, 1857.

MARY HUNT, BY HER NEXT FRIEND, *v.* WALTER R. DANFORTH, EXECUTOR.

In consideration of eight hundred dollars, advanced by a wife from her separate estate, the husband conveyed certain property in trust for his wife to A.; after which he assigned all his property to A., for the benefit of creditors. On a bill in equity by the wife against the representative of A., to enforce the trust, it was

Held, 1. That even if the husband and wife knew that the value of the property conveyed exceeded eight hundred dollars, which excess ought to have gone to the creditors, it could not therefore be presumed that the conveyance, absolute on its face, was intended as a mortgage.

2. A trustee cannot be allowed to attack the validity of the deed under which he has gone into possession, unless he clearly shows he has been deceived into taking a title which, without knowledge or laches on his part, really belonged, partly or wholly, to himself. The defendant cannot be allowed to attack this deed as in fraud of his testator and the other creditors, unless he alleges and clearly shows that said testator was ignorant of, and deceived by, such fraudulent intent.

Where there is not concurrent jurisdiction, the pendency of an action at law cannot defeat a suit in equity, since, in such case, the former must be wholly or partially ineffectual in obtaining the relief sought.

This case, which was previously before the court on a demurrer to the bill, and is reported in 2 Curtis's C. C. R., 592, now came on to be heard on the pleadings and proofs.

The bill and exhibits are printed in the former report of the case.

The defences set up by the answer were:

1. That the only valuable consideration for the conveyance from Hunt to Anthony, in trust for the complainant, was the separate estate of the complainant, of the value of about eight hundred dollars, appropriated to the use of Hunt; and that the conveyance to Anthony was made solely for the purpose of securing the re-payment to the complainant of that sum. In support of this allegation, the answer alleges that when the said conveyance was made, Hunt was insolvent, and immediately after the execution thereof, made to Anthony an assignment in the following terms:

"*Know all men by these presents:* That I, Stephen W. Hunt, of the city and county of Providence, State of Rhode Island, for and in consideration of the sum of one dollar, to me in hand paid, and in consideration of the trusts hereinafter mentioned, by Burrington Anthony, of said Providence, do hereby assign, sell, convey, set over, and deliver unto him, the said Burrington Anthony, his heirs and assigns, all my debts, dues, and demands of every kind, name and nature, consisting of notes, book accounts, choses in action, and judgments of court, and boxes containing goods, and one one-horse sleigh, also, one share in the City Hotel. Hereby constituting him, the said Burrington Anthony, my lawful attorney, with power irrevocable, to sell, transfer, assign, set over, and deliver, and to collect all and every of said property, in his own name, and to make compromises and due acquittances and discharges for the same, and to collect and apply the proceeds thereof to and for the following uses and purposes, and in the order hereinafter named, viz:

First, to pay and discharge all the expenses accruing in the execution of this assignment, including a reasonable compensation to said trustee.

Secondly, to pay all debts due from me to Burrington Anthony, either by note, book accounts, money borrowed, or as endorser.

Thirdly, after paying and discharging all the aforesaid trusts, to pay all debts due from me to my creditors, rateably, if insufficient to pay the whole of said last mentioned class of debts.

And I, the said Burrington Anthony, for and in consideration of the aforesaid trusts, do hereby covenant to

and with the said Stephen W. Hunt, well and truly to do and perform all things on my part to be done and performed, according to the true intent and meaning of these presents."

In witness whereof, we have hereunto set our hands and seals, this third day of April, in the year 1843.

STEPHEN W. HUNT. (L. S.)
BURRINGTON ANTHONY. (L. S.)

Signed, sealed, and delivered, in presence of
NATHANIEL SEARLE.

That Hunt immediately afterwards took the benefit of the insolvent law of Rhode Island.

And that, consequently, save as a security for the repayment of the said sum of eight hundred dollars, the conveyance, under which the complainant claims, is wholly void, as against the creditors of Hunt; and that Anthony, in his life-time, paid to the complainant, from the rents and profits of the trust property, enough to cancel that sum.

The answer insists that whatever Anthony received from the property conveyed to him, beyond that sum, he received as assignee for the benefit of creditors, and not as trustee for the complainant; and further, that Anthony was himself a creditor of Hunt, and entitled in that capacity to retain, under the assignment to him for the benefit of creditors, all he has received, and not paid to the complainant, from the property in question.

2. The answer alleges that the complainant has commenced a suit at common law, which is still pending.

3. It sets up the six years' statute of limitations, as a bar to an account.

CURTIS, J. The conveyance from Hunt to Anthony, in trust for the sole and separate use of the complainant, is shown to have been made in consideration of the appropriation to the use of Hunt, of a mortgage, upon which the sum of eight hundred dollars and some interest was due, and which was the separate estate of the complainant.

The conveyance from Hunt to Anthony, on its face, is absolute. There is no witness who says it was intended as a mortgage. The property was leasehold, subject to a very considerable ground rent. The lessor had the right to refuse to take and pay for the buildings which the les-

sees had erected on the premises; and it is not averred in the answer, nor shown in evidence, that the salable value of the lease, at the time of the conveyance to Anthony, in trust, much exceeded the sum of eight hundred dollars.

Nor was any ground upon which the court could pronounce this a mortgage, suggested at the hearing, save that to hold it an absolute conveyance, would be to impute to Hunt an intention to convey to his wife property which ought to belong to his creditors.

But even if this suggestion were supported by evidence that Hunt then knew the salable value of the leasehold interest much exceeded the sum which his wife had advanced for him from her separate estate, and that his wife also was cognizant of that fact, it would be a violent assumption to make, in the absence of all other evidence, that they could not have intended an absolute conveyance. Although, justly, some part of the property should have gone to creditors, there is no impossibility, certainly, that Hunt may have designed that it should all belong to his wife. He has said so by the deed, and there is nothing to control what he has so said. I cannot, therefore, declare this to be a mortgage, upon the footing of the actual intention of the parties to have it one.

It is equally clear that the defendant, as Anthony's representative, cannot be allowed to attack the trust deed as fraudulent as against Anthony and other creditors. If a trustee can ever be permitted, for his own profit, to deny the validity of the conveyance in trust under which he has gone into possession, it can only be where he clearly shows he has been deceived into taking a title, which, without his knowledge, or any laches on his part, really belonged partly or wholly to himself. But there is no pretence of any such case here. There is nothing tending to show a fraud on creditors, of which Anthony is alleged in the answer to have been ignorant, or of which the proofs tend to show he was ignorant, when he went into possession under this deed. If the actual salable value of the property had been shown to have exceeded the consideration, there is no more reason for holding Anthony ignorant of that fact than either of the other parties. And this is the only fact upon which a case of fraud on creditors can be based. The answer does not allege what the value was, nor that Anthony was ignorant

of it. If a fraudulent intent existed, it is as consistent with the answer that Anthony concurred therein, as it is that Mrs. Hunt, the complainant, concurred therein.

Nor can any rights be claimed for Anthony, as assignee, for the benefit of creditors; for the property thus assigned to him did not include what had just before been conveyed to him by the trust deed, under which Mrs. Hunt claims in this case.

In respect to the defence that a suit at law had been brought, and is still pending, it is difficult to perceive how such a defence can ever defeat a suit in equity, save in cases of concurrent jurisdiction. If the subject matter of the suit is such that a court of law, under its common law powers, can afford a plain, adequate, and complete remedy, a court of equity has no jurisdiction, and it is not material whether a court of law has or has not been resorted to.

If a court of law cannot afford such a remedy, equity will not fail to afford one because the complainant has made an attempt elsewhere, which must be, either wholly or partly, ineffectual.

There is a class of cases over which equity has an ancient and established jurisdiction, but which, by an enlargement of the equitable powers of courts of law, by statute or otherwise, have been brought within their cognizance.

Whether a plea of a prior suit pending in a court of law, in such a case, would defeat a suit in equity, it is not necessary here to determine. This suit, by a married woman, to enforce an express trust for her sole and separate benefit, is one in which the remedy afforded by a court of law is far from being the same as is obtainable in equity; as has been held in this case, when it was before the court on a demurrer to the bill.

The bar of the statute of limitations cannot be allowed. It is a case of express trust, never so disclaimed by the trustee as to cause the bar to begin to run. *Taylor* v. *Benham*, 5 How. 233.

The cause must be referred to a Master, to take an account.

Joseph S. Pitman and *Bradley*, for the complainant.

Jenckes, contra.

United States District Court. Massachusetts District. March, 1859.

UNITED STATES BY INFORMATION *v.* ONE CASE STEREOSCOPIC SLIDES.

If a verdict finds facts not put in issue by the pleadings, it is so far nugatory.

By statute of 1857, chap. lxiii., if an invoice or package of imported goods contains some articles which are indecent or obscene, and others which are not, the whole are liable to forfeiture. The indecent articles are to be destroyed, and the others to be sold.

An information was filed against one case of stereoscopic slides, alleging them to be indecent and obscene, and praying that they might be condemned and destroyed; and the general issue was pleaded. The jury found that a part of the slides imported in the case were indecent, and that the rest were neither indecent nor obscene.

Under such pleadings, only those found to be indecent can be condemned, and the residue must be acquitted.

The facts appear in the opinion of the court.

SPRAGUE, J. This prosecution is founded on the statute of 1857, chap. lxiii., prohibiting the importation of indecent or obscene articles, prints, paintings, lithographs, &c.

The seizure was made on land, a trial has been had by jury, who have returned their verdict; and the question now is, what judgment shall be entered.

The information sets forth that "on the 30th of December, 1858, Arthur W. Austin, then and now Collector of the customs for the revenue district of Boston and Charlestown, in said district of Massachusetts, did, at said port of Boston and Charlestown, and on land, seize as forfeited to the use of the said United States of America, one case of stereoscopic slides, marked J. B. 111, imported into the United States from a foreign port or place, in the steamship Arabia, and now hath the same in his possession, as being forfeited and subject to destruction, for that the said stereoscopic slides are indecent and obscene articles."

The information concludes with praying "that the said case of stereoscopic slides be condemned by the definitive sentence and decree of the said Judge, as forfeited, and subject to destruction, and that the same may be destroyed, after condemnation."

Walter P. Cottle appeared and put in a claim as owner to all the stereoscopic slides, excepting fifty-nine; those fifty-nine are admitted to be indecent, and subject to con-

demnation. The residue, being 1924 in number, the claimant defends, and has put in a plea, denying the truth of the allegations in the information, that is, amounting to the general issue. Upon this plea, the jury have returned the following verdict :

" The jury find that the case of stereoscopic slides named in the said information, was imported by the said W. P. Cottle; and said case did contain fifty-nine stereoscopic slides, that are indecent; and that as to all the other stereoscopic slides contained in said case, and claimed by said W. P. Cottle, the same are not indecent or obscene."

The District Attorney now moves that judgment be rendered against all the stereoscopic slides, as forfeited; and that the fifty-nine which have not been claimed or defended, and are admitted to be indecent, be ordered to be destroyed, and that the residue be ordered to be sold for the benefit of the United States.

As to the fifty-nine there is no controversy. They were a part of the contents of the case proceeded against in the information as indecent, and being found to be such, must be condemned and destroyed. But as to the 1924 which have been claimed and defended, the motion of the District Attorney encounters two difficulties.

1st. The only allegation against them in the information is that they are indecent and obscene; but the verdict finds that they are neither indecent nor obscene. But it is urged that they were imported in the same package with others that were indecent, and for that reason are subject to forfeiture. But this ground of forfeiture is nowhere alleged in the information. The charge in the information is quite different. They are charged not with being merely in bad company, but with being themselves corrupt; and the sentence denounced by the law for these two offences is by no means the same: for the one they are to be forfeited and sold; for the other they are to be condemned and destroyed. The information asks only for this latter judgment, and presents a case warranting only that judgment.

How, then, can I make a decision upon grounds not set up in the pleadings, and render a judgment not called for or warranted by them? It is urged that I may do so, because the verdict finds sufficient to authorize condemnation. But this position is untenable. The verdict can

legitimately find no fact that has not been put in issue; and so far as it goes beyond the allegations of the pleadings it is inoperative and void. The jury can decide only the questions which have been submitted to their determination by the pleadings. If, therefore, it were true, as assumed in the argument, that the verdict contains enough to warrant a judgment of forfeiture, still such judgment could not be pronounced upon this information, and the plea of the general issue.

But there is still a further difficulty. The verdict does not find facts enough to warrant condemnation. It finds, indeed, that the 1924 stereoscopic slides which were not indecent were imported in the same case with the fifty-nine which were indecent. The statute prohibits the importation of indecent or obscene articles, and declares that "all invoices and packages whereof any such articles shall compose a part, are hereby declared to be liable to be proceeded against, seized, and forfeited." The verdict does not find that the stereoscopic slides claimed and defended in this case were in any invoice or package of which the fifty-nine which were indecent composed a part. It is only found that they were in the same case. Now, although a package is not always a case, yet it may be true that a case of goods, in the language of importers, is always a package; but this I cannot judicially know. It is a question of the meaning of a term used in a particular trade or business. The statute relates to importation from abroad, and the names it uses in describing articles of importation have the meaning which has been given to them by those engaged in that business. What is the meaning of such terms, or of technical words in any art or science, is a question of fact, to be submitted to the jury. Thus, under the revenue laws, whether a certain article imported was loaf sugar; and in another case, whether the article was hemp; and in another, whether it was crude saltpetre, were submitted to the jury. Indeed, this has been done in a great many cases, and as to a great variety of goods. The jury not having found that the case in which all these stereoscopic slides were imported was a package, I do not know, and cannot assume it to be so. The verdict, therefore, does not show that the 1924 claimed by Mr. Cottle were imported contrary to law; and as to them, on both grounds of objection, the judgment must be, that the United States

take nothing by their information; and that the bond which was given by the claimant, to obtain a delivery of those articles, be cancelled.

C. L. Woodbury, District Attorney, for the United States.

B. F. Hallett, for the claimant.

United States Court of Claims.

REPRESENTATIVES OF JAMES THATCHER *v.* THE UNITED STATES.

Under the resolve of Congress, of October 21, 1780, providing that "the officers who shall continue in the service to the end of the war, shall be entitled to half-pay during life," surgeons of regiments were not included. Per Loring, J.; Scarburgh, J., dissenting.

The representatives of a person entitled to a pension under the act of May 15, 1828, but who never obtained its allowance, or any adjudication in his favor, have no claim for the money after his death.

Under a general act, like that of 1828, no person becomes a pensioner, so as to leave "arrears of pension," within the meaning of the acts of Congress upon the subject, until after such adjudication in his favor by the Secretary. Per Blackford, J.; Scarburgh, J., dissenting.

LORING, J. James Thatcher was a regimental surgeon in the army, in the war of the revolution, and survived the war. Under the act of 15th May, 1828, (4 Sts. at Large, 269,) he received $480 per year, from the 3d of March, 1826, to the 4th of March, 1831, a period of five years.

The petitioners allege that the said James Thatcher was entitled to, and demanded, under said act, the sum of $600 per year, so that a balance of $120 was left unpaid to him in each year of said period, and they now claim the amount of said balances.

I am of opinion that the said James Thatcher was not within the provisions of the said act of 15th May, 1828, and that his representatives can claim nothing by force of it.

The first section of the act of 15th May, 1828, is as follows:

"*Be it enacted, &c.*, That each of the surviving officers in the army of the revolution, in the continental line, who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive, out of any money in the treasury, not otherwise appropriated, the amount of his full-pay in said line, according to his rank in the line, to begin

on the 3d of March, 1826, and to continue during his natural life: *Provided*, that under this act no officer shall be entitled to receive a larger sum than the full-pay of a captain in said line."

The words of the section are unambiguous, and they expressly confine recipients under it to those who were entitled to "half-pay by the resolution of October 21, 1780; so that the question is brought to this, whether surgeons of regiments were entitled to half-pay under the resolve of October 21, 1780.

On the part of the petitioner, it is claimed that in the resolution of October 21, 1780, giving half-pay for life, the word "officers" includes medical officers, and therefore surgeons. On the part of the United States, it is claimed that the word "officers" in that resolve, denotes only officers of the line of the army.

The resolve of October 21, 1780, had for its general object the arrangement of the line of the army. It first constitutes regiments, by declaring of what they shall consist, thus: "*Resolved*, That the several regiments of infantry requested from the respective States by a resolution of the 3d instant, be augmented, and consist of one colonel, one major, where the full colonels are continued, or one lieutenant colonel commandant, and two majors, where full colonels are not continued; nine captains, twenty-two subalterns, one surgeon, one surgeon's mate, one sergeant major, one quartermaster sergeant, forty-five sergeants, one drum major, one fife major, ten drums, ten fifes, six hundred and twelve rank and file."

It then arranges the officers of companies; then provides for the augmentation of the regiments of artillery; then for four legionary corps, instead of four regiments of cavalry; then for two partisan corps; then for the enlistment of the whole of the troops for the period "of the war," and for the time they shall join their respective corps; then for officering the regiments of the Southern department of the army; and then, in immediate sequence of such arrangement of the line of the army, it provides as follows:

"That the *officers*, who shall continue in the service to the end of the war, shall also be entitled to half-pay during life, from the time of their reduction."

The argument for the petitioners is, that the word "officers," in the clause last cited, and giving half-pay, includes

surgeons, because surgeons are specified in the first clause of the resolution. But it is to be recollected that that specification is made only in the enumeration of the constituent parts of a regiment, and was as necessary for that purpose as the specification of fifes and drums.

And that the word "officers," in the clause giving half-pay, was not used in reference to the enumeration in the first clause, declaring the constituent parts of a regiment, is shown by the fact, that although general officers are not mentioned in that first enumerating clause, they were yet included in the clause giving half-pay.

For, on the 28th November, 1780, (3 J. C. 551,) Congress thus resolved: "Some doubts having arisen in the minds of the general officers, whether the resolution of the 21st October last, granting half-pay for life to the officers who shall remain in service to the end of the war, was meant to extend to them,"

"*Resolved*, That the said half-pay for life be extended to all major generals and brigadier generals, who shall continue in service to the end of the war; that the resolution of the 21st October was so meant and intended."

This shows that it was not intended that the enumeration in the first clause of the resolution should construe the word "*officers*," in the clause giving half-pay, and thus excludes the petitioner's argument. And I think, as it was contended at the bar, that the resolution of October 21, is to be construed in connection with other resolves, with which it forms one legislative transaction, in fact, and in the history of the times.

This resolve of October 21, 1780, was one of a series of resolves passed by Congress in that year, for the reduction and organization of the army; and in making that reorganization, Congress arranged the several departments of the army separately, and each department in a distinct resolve. Thus, by the resolve of the 15th July, 1780, it arranged the quartermaster's department; by the resolve of the 30th September, the medical and hospital department; by the resolve of the 3d October, the regiments or line of the army; and by the resolve of the 30th November, the commissary department. It would seem that in such a separate arrangement of the departments, each in a distinct resolve, the word "officers," in either of the resolves, would refer to and denote "*officers*" in that particular department

to which the resolve related: that is, that in the resolve arranging the medical and hospital department, the word "officers," would mean medical and hospital officers; and in the resolve arranging the line of the army, the word "officers" would mean officers in the line of the army.

Then, in this series of resolutions, the only provision for half-pay is that of half-pay for seven years, and that is given only in the resolution of October 3d, arranging the line of the army, and it is omitted in the other resolutions of the series, arranging the other departments of the army. The inference would be, that half-pay was provided only for officers in that department arranged by the resolution of October 3d, and was not provided for officers of those departments arranged by the other resolves; and this would be the inference, because the letter of the resolutions, taken altogether, would so read.

But the resolutions of October 3d and 21st were both for arranging the line of the army, and the latter was only, as its history shows, an amendment of the former, substituting a provision of half-pay for life for the provision of half-pay for seven years; and in such case, the inference is, that the substituted provision is to belong to the same class of officers as the original provision, and that, therefore, the purpose of the amendment was to enlarge the half-pay of that class of officers, and not to extend half-pay to other classes of officers for whom no half-pay was provided in arranging the departments to which they belonged.

The history of the resolution of October 21, 1780, showing that it was an amendment of the resolution of October 3d, is contained in the journals of Congress, by which it appears that the resolution of October 3d, (and, as far as appears, no other of the series,) was sent to General Washington by Congress, requesting "his opinion thereon." General Washington, in his reply, (dated October 11th,) earnestly urged half-pay for life, and then said: "If the objection drawn from the principle of this measure being incompatible with the genius of our government, is thought insurmountable, I would propose a substitute, less eligible in my opinion, but which may answer the purpose. It is to make *the present half-pay for seven years* whole pay for the same period." The journals of Congress show that on the 21st October, 1780, Congress resumed the consideration of the report of the committee on General Washington's

letter of the 11th, and carried out his recommendation of full-pay for life by the resolution we are construing. It would seem clear that "the present half-pay for life for seven years," referred to by General Washington, was the half-pay specified in the resolve of October 3d, arranging the line of the army, on which, and on which only, his opinion had been asked, and which he was then returning, with his comment on it, to Congress; and that it was instead of that half-pay for seven years, that Congress adopted the half-pay for life.

If the resolve of October 3d and 21st referred only to officers of the line, and provided half-pay only for them, then, as the officers of the quartermaster's department and the commissary department were taken from the line, and were thus within those resolutions, there was a wide difference in the matter of half-pay between the officers of the hospital and medical department, and all other officers. While the half-pay was only for seven years after the war, there was some reason for this difference, because officers of the line were withdrawn by their military life from their civil avocations, and from practice and position in them, and to return to them and regain position in them, at the end of the war, would require some time, in which they would need means of support, and this, and no more, the half-pay for seven years would supply. But medical officers were not withdrawn from the practice of their civil professions by their duties in the army, but by these their experience and practice in their profession would be generally largely extended, and they would return to civil life better instructed and skilled than when they left it. And this may have been the reason for not extending the half-pay for seven years to them originally. But this reason would not account for the discrimination between medical officers and all others, when the resolve of October 21, 1780, changed the half-pay for seven years into half-pay for life, for such half-pay was not a temporary supply, but a permanent benefit, earned by service during the war, and the title to this belonged to medical officers as well as officers of the line. Thus, by the resolution of October 21, 1780, the difference between the medical officers and others, as to half-pay, became extended in degree, and no longer justifiable by its former reason, and they complained of this difference; and Congress immediately passed the resolution of 17th Janu-

ary, 1781, which in its preamble seems to me to declare that medical officers were not within the resolution of October 21, 1780; because it admits that the difference referred to exists, that it was not justifiable, and then proceeds to enact a remedy therefor.

It is observable, that previous to the resolution of 17th January, 1781, the only express provision for surgeons was by the resolution of September 30, 1780, for arranging the hospital department, already referred to, and that resolution gave them bounty lands, and no more.

The resolution of January 17, 1781, in its preamble and enacting clause, is as follows: "Whereas, by the plan for conducting the hospital department, passed in Congress the 30th day of September last, no proper establishment is provided for the officers of the medical staff, after their dismission from public service, which, considering the custom of other nations, and the late provision for the officers of the army, after the conclusion of the war, they appear to have a just claim to: for remedy whereof, and also for amending several parts of the above mentioned plan,

"*Resolved*, That all officers in the hospital department and medical staff, hereinafter mentioned, who shall continue in service to the end of the war, or be reduced before that time as supernumeraries, shall be entitled to, and shall receive during his life, in lieu of half-pay, the following allowance, viz."

The resolution then proceeds to make the allowances to the several officers it mentions, and among them specifies surgeons of regiments, and gives to them an allowance "equal to the half-pay of a captain." This was not equal to half their own pay, and therefore to them was not half-pay, but "in lieu of half pay," as the resolution describes it.

Now, the purpose of this resolve, as declared by the preamble, is, to give officers of the medical staff "a proper establishment" "after their dismissal from the public service," which, it says, "they appear to have a just claim to." Could such language have been used, if such establishment had already been secured to them by the resolve of October 21, 1780, and in the fullest measure given to any?

Then the preamble contrasts the condition of medical officers with that of the officers of the army expressly in the point "of the late provision" made for the latter. Could this have been done, if medical officers and officers of the army were equally included in that "late provision?"

The whole tenor of the preamble shows the purpose of improving the condition of the medical officers. For after referring to that condition it says, "for remedy whereof." But the resolve of January 17, 1781, made the condition of surgeons worse than it was before, if they were included in the resolve of October 21, 1780; for under this latter resolve, they would have been entitled to half their own pay, while the resolve of January 17, 1781, gave them much less, viz., only half a captain's pay.

The purpose of a preamble to a statute is to guide the construction of its enacting clause. The construction contended for by the petitioner makes the enacting clause reverse the general purpose declared by the preamble, and presents Congress as proclaiming a benefit to meritorious officers, while it intends and inflicts an injury upon them. This seems to me the inevitable result of holding that the resolve of January 17, 1781, was a mere amendment of the resolve of October 21, 1780, and that this latter resolve included medical officers. Whereas the preamble and enacting clause of the resolve of January 17, 1781, and the professions and acts of Congress are brought into harmony, not only with each other, but with the history of the times, and of the transaction, if that resolve was enacted for the reason that medical officers were not included in the resolve of October 21, 1780.

The history of the resolve of January 17, 1781, is shown in the journals of Congress, (3. vol. p. 569.) which state thus, (January 17, 1781:) "Congress took into consideration the report of the committee on the letter of the 5th of November from General Washington, &c., &c. That letter was sent to Congress by General Washington, with a memorial addressed to him by the officers of the hospital department, in which they complain that "the regimental officers are established on half-pay for life, while we are left without that provision;" and they claim such provision. General Washington, in his letter of November 5th, transmitting this memorial to Congress, asks to know "how far the resolves of the 3d and 21st ultimo are to be construed in favor of the regimental surgeons who are to be reduced, the ascertaining of which previous to the arrangement is become interesting to them, and the subject of a variety of applications to me." The letter of General Washington then proceeds to urge the claims of the memorialists, but

advises that they should not be considered as entitled to half their own pay, but to an allowance of some less sum; and it adduces the example of the British service, and says "that in that the surgeons of the hospital and regimental surgeons are upon reduction entitled to half-pay;" and he adds, "what the pay of the hospital surgeons in the British service is, I am not quite certain, but I believe it is equal to that of the captains."

Thus General Washington declares his own doubts whether regimental surgeons were included in the resolve of October 21, 1780, and asks the instruction of Congress on that point; and Congress, making the declarations in the preamble of the resolve of January 17, 1781, already commented on, frames that resolve in conformity to Gen. Washington's suggestions, and gives surgeons the half-pay of captains only.

The preamble of the resolve of 17th January, 1781, is the answer of Congress to the inquiry of General Washington, whether regimental surgeons were included in the resolve of October 21, 1780, and it is a legislative construction of that resolve, made by its framers, within three months of its passage; and I think its declarations are, in substance, that no provision in the nature of half-pay after the war, had yet been made for medical officers; that they had "a just claim" to such provision, as was shown by the usages of other services, and by "the late provision," by the resolve of October 21, 1780, for officers of the line of the army; and that to fulfil this just claim of the medical officers, and to remove the unjustifiable difference between them and other officers, ("in remedy whereof") the resolve of 17th January, 1781, was passed. If this is so, surgeons were not within the resolve of October 21, 1780; and therefore were not within the act of May 15, 1828.

It is to be recollected that the question on the statute of 15th May, 1828, is not whether Congress intended to give or withhold from surgeons the full-pay given to officers of the line; but whether Congress intended to give such full-pay to surgeons by that particular act. The words of the statute refer exclusively to the resolution of October 21, 1780, and can be extended to no other by construction.

The petition alleges that Dr. Thatcher received $450 per year, under the act of May 15, 1828, and thus exhibits the opinion of the department that he was within the provisions

of the act. For that opinion I have great respect, but I am not authorized to defer to it in the construction of a statute.

I am of opinion that evidence should not be ordered to be taken in this case.

BLACKFORD, J. * * * The third question is, whether the claimants, supposing their father to have been entitled to the pension in question, but did not obtain its allowance, have a right to the money after his death.

If this question can be answered in the affirmative, it is because such right is conferred by some act of Congress. Pensions for past services, like those of the claimants' father, are mere gratuities, and it is the acts alone, making the gift, on which the claimants must rely.

The act of May 15, 1828, under which Thatcher himself claimed, is silent as to representatives. Whatever right that act gives is given to the officer alone. The act does not even provide for the payment to any person of a pension, or the balance of a pension, remaining undrawn by the pensioner at the time of his death. (4 Sts. L. 269.)

The next is the act of March 3, 1829. The second section of that act supplies an omission in the act of 1828, and provides for the payment of the arrears of pension, due to the pensioner at the time of his death, to the widow, or, if no widow, to the children, or, if no children, to the legal representatives. (4 Sts. L. 350.)

If the present were a claim for arrears of pension, left undrawn by a pensioner at the time of his death, and who left no widow, the act would be applicable. But this is a different case. Thatcher was not a pensioner as to the money now claimed. The act of 1828, under which he claimed, was not an absolute grant of pensions. An officer within that act had a right to a certain pension, provided he satisfied the Secretary of the Treasury that his claim was valid, and obtained an adjudication by the Secretary in favor of the claim. But until such adjudication the officer was not a pensioner, and had no right to draw a pension from the Treasury. Claims for pensions under general acts, like that of 1828, differ entirely from claims under private acts granting pensions. When an act directs the Secretary to place a person by name, on the pension list, at a specified rate, that is an absolute grant of the pension

to the person named; and if he should die after such grant, leaving the pension or any part of it undrawn, the provision in the act of 1829, as to those who came after him, would apply. But, as before said, the grant by the act of 1828 was conditional, and until the officer embraced by the act performed the condition, he could not be called a pensioner, nor would he leave in the treasury at his death any arrears of pension. There would be no pension there that he could have drawn himself, and of course he would leave none to be drawn by others.

The appropriation act of 1828 has this provision: "For the pensions to the revolutionary pensioners of the United States, two hundred thousand dollars." (4 Sts. L. 312.) Now was Thatcher, as to said sum of $120 a year, one of those pensioners? He was not; for the reason that he had not complied with the condition contained in the act of 1828, under which he claimed. It would not, perhaps, be strictly proper to say that the only evidence of a person being a pensioner, is the pension-list; but it is safe to say, that without an adjudication in his favor as aforesaid, a person is not a pensioner, nor can he at his death leave arrears of pension descendible under the act of 1829. (4 Sts. L. 350.)

The next act is that of June 7th, 1832. That act provides that "in case of the death of any person embraced by the provisions of this act, or of the act to which it is supplementary, (said act of 1828,) during the period intervening between the semi-annual payments directed to be made by said acts, the proportionate amount of pay which shall accrue between the last preceding semi-annual payment and the death of such person, shall be paid to his widow; or, if he leave no widow, to his children." (4 Sts. L. 529.) The semi-annual payments thus directed to be made are evidently the payments of an allowed pension; and the proportionate amount spoken of in the act, to be paid on the death of a person embraced by it, is the balance of the pension at that time due to him.

The next is the act of July 4th, 1836. The second and third sections relate to persons who had served in the revolutionary war, but they have no application to the present case. The first section only applies to persons who died between the 4th of March, 1831, and the 7th of June, 1832; and the third section makes no mention of children. (5 Sts. L. 127.)

I now come to the act of June 19th, 1840, which is the act, with said act of 1828, upon which the claimants principally rely. That act of 1840 is as follows:

"That in case any male pensioner shall die leaving children, but no widow, the amount of pension due to such pensioner at the time of his death, shall be paid to the executor or administrator on the estate of such pensioner, for the sole and exclusive benefit of the children, &c.

"Section 2. That in case any pensioner, who is a widow, shall die, leaving children, the amount of pension due at the time of her death shall be paid to the executor or administrator, for the benefit of her children, as directed in the foregoing section.

"Section 3. That in case of the death of any pensioner, whether male or female, leaving children, the amount of pension may be paid to any one or each of them, as they may prefer, without the intervention of an administrator." (5 Sts. at L. 385.)

This act applies exclusively to pensioners; that is, to persons who, under some act of Congress, have been allowed pensions by an adjudication of the proper department; or to whom, by name, pensions have been directly and absolutely granted by private acts of Congress. The remarks which have been made in a previous part of this opinion, in relation to the act of 1829, are applicable to this part of the case. As Thatcher died without having obtained in his favor an adjudication of his claim to a pension, in respect to said $120 per annum, by the proper officer, that sum was not due to him from the treasury as a pension at the time of his death; and the claim, therefore, is not within said act of 1840.

All of the acts of Congress cited by the claimants, have now been noticed, none of which appears to support their claim.

It must be observed further, with regard to said acts of 1829 and 1832, that nothing could pass under them to the claimants, if their father left a widow. And we are bound to presume that he did leave a widow, as the contrary is not alleged in the petition. So that, at all events, as to any claim under those acts, the petition shows no cause of action.

It appears that the practice of allowing these claims to children has prevailed in the department between twenty

and thirty years; and an opinion of Attorney General Wirt, in 1825, in a navy pension case, is supposed to have occasioned the practice. (2 Att. Gen. 1.) The practice has been approved by some heads of the departments, but the weight of authority is decidedly against it. In February, 1836, Attorney General Butler gave an opinion against the principle on which such claims were founded. (3 Att. Gen. 36.) But he afterwards yielded to Mr. Wirt's opinion, and the usage of the department. In March, 1839, the Secretary of the Treasury, Mr. Woodbury, wrote to the Commissioner of Pensions as follows:

"I had always supposed that the granting a pension was a personal matter, and when the claimant died, the claim did not descend to his heirs or representatives; or if the certificate issued incautiously to a claimant after his death, that it was void. Any other view, I supposed, would lead thousands to apply for pensions for their fathers and grandfathers, who may have died after the law passed, and with claims to the pensions, but who never perfected their title and obtained the certificate while living. If the certificate issued while the claimant was living, then, of course, I suppose the heirs could receive any arrearages, and only then. If there has been an opinion of the Attorney General the other way, or any express legislation, then, of course, no doubt could be sustained in the case; but otherwise I would thank you to lay this letter before the Secretary of War." (Mayo and Moulton, 538.)

In March, 1850, Mr. Ewing, the Secretary of the Interior, wrote to the Commissioner of Pensions as follows:

"SIR: I herewith return the papers in the case of Mrs. Elizabeth Thom, widow of Nathaniel Thom, deceased, and I am of the opinion that the act of June 19, 1840, in its terms applies to *pensioners*, which means persons receiving pensions, not those who can make out a case entitling them to receive pensions, but who have not done it. They are not *pensioners*, though they may become so. This act regards the actual pensioner only, and provides for the payment of so much of his pension as may have accrued and remained unpaid at the time of his death." * * * (Mayo and Moulton, 567.)

In August, 1850, Mr. Crittenden, Attorney General, gave the following opinion:

"It appears that Dr. John Knight was a pensioner for

1838, when he died; that his widow, Polly Knight, under the act of July 7, 1838, applied for and obtained a pension in April, 1839, commencing at the time of his death, according to the practice of the pension office, as it existed at the time; that pension was fully paid up to the time of her death, which happened before the passage of the resolution of the 16th of August, 1842, and before the expiration of the five years for which it was granted, computing from the death of her husband, on the 12th of March, 1838. * *

"Had Mrs. Knight been entitled to a pension, to commence from the 4th of March, 1836, yet having, during her life, acquiesced in the decision of the proper officer, giving it a different commencement, her representatives have no right, as it seems to me, to contest that matter after her death. The pension was intended as a personal bounty to her, and not as a gratuity to her representatives. All that passed to them on her death was a right to have the money which had accrued under her pension, as it had been actually allowed, and which remained unpaid at the time of her death." (5 Att. Gen. 248.)

In February, June, and November, 1856, Attorney General Cushing gave opinions, saying that the law, properly construed, was against such claims as the one before us; but that on account of the long practice of the department in favor of them, he did not advise a departure from it. (7 Att. Gen. 619, 717, and 8 id. 198.)

In September, 1857, the present Attorney General, Mr. Black, gave an opinion that the practice of the Pension Office, allowing such claims, was not supported by any law; and his opinion has not only been approved by the present Secretary of the Interior, but the practice has been discontinued by the Secretary. (Vol. 2, part 1, 1st ses. 35th Cong. p. 66.) The claimants rely on a late decision of the Supreme Court of the United States, in the case of *Walton et al.* v. *Cotton et al.* (19 How. 355.) But the question as to the legality of these claims was not raised in that case by the counsel, nor was it noticed or decided by the court.

It is the opinion of the court that the facts set forth in the petition do not furnish any ground for relief. An order for testimony is not granted.

SCARBURGH, J. * * * Dr. Thatcher, then, being in his lifetime entitled to an annuity of six hundred dollars a

year, under the act of May 15, A.D. 1828, from the 3d day of March, A. D. 1826, till the 4th day of March, A. D. 1831, a period of five years, and having received payment therefor at the rate of only four hundred and eighty dollars a year, the question now arises whether his personal representatives are entitled to receive the balance still remaining due, to wit, six hundred dollars.

Dr. Thatcher was alive when the act of 1828 passed, and survived the 4th day of March, A. D. 1831. He proved, in the manner prescribed by the Secretary of the Treasury, his title to the benefits of the act, but in consequence of an erroneous decision of the Secretary, received only four-fifths of what he was entitled to. His title to the remaining fifth, which he did not receive, was as clear as his title to the four-fifths which he did receive.

The act, it seems to me, gave to each officer who served in the manner prescribed by it, a *title* to its benefits. It authorized him to receive the pay thereby provided. It required certain money to be deducted "from what said officer would otherwise be *entitled* to." It directed the *pay* to be paid "to the officer or soldier *entitled* thereto." It required the officer or soldier *entitled*, to furnish evidence of his *title*. The amount which accrued from the 3d day of March, A. D. 1826, to the 3d day of March, A. D. 1828, was made payable "as soon as may be," and that which accrued afterwards was made payable semi-annually. Such a *title*, it seems to me, is property, capable of being transferred *inter vivos*, and transmitted to representatives by death. The terms employed are appropriate to this purpose, and were, I think, so understood by Congress. Hence an express provision was inserted, declaring that it should not be transferable or liable to legal process — qualities which it would have possessed but for this provision.

The only provision of the statute, from which it might be inferred that this interest is not transmissible by death to personal representatives, is that which declares that it shall enure wholly to the personal benefit of the officer or soldier entitled to it. But this I regard as but an emphatic mode of declaring what had before been expressed — that it should not be transferred to a purchaser, or subjected by legal process to the payment of his debts. It was to be his own in all other respects, and for all other purposes.

I feel the more confidence in this construction, because it is the cotemporaneous construction put upon the act immediately after its passage, by the Secretary of the Treasury, whose duty it was to carry it into execution, *and* that which it continued to receive till the year 1857.

Whether the second section of the act of March 2d, A. D. 1829, was applicable to this case, is a question which I do not deem it material to consider.

After the act of 1828, thus construed by the executive department of the government, had been in operation more than four years, the act of June 7th, A. D. 1832, was passed. The latter act was "supplementary" to the former, extending its benefits to a much larger class of officers and soldiers; but as regards the question now under consideration, its language was identical with that of the act of 1828. The act of 1832 thus adopted language which had already received a practical construction by that department of the government to which its execution had been committed. The legal presumption is, not only that this was known to Congress, but that in again using language, the meaning of which in a previous statute had been ascertained, their intention was to use it in that sense. (Bac. Ab. 379.) I regard this as a legislative approval of the construction which had been adopted. The Secretary of the Treasury, accordingly, put the same construction on this act which he had previously put upon the act of 1828; and this construction, though occasionally questioned, continued uninterruptedly to govern the practice of the executive department of the government under it till the year 1857, when the present Attorney General gave an opinion that it is erroneous.

My views, it seems to me, are still further strengthened by the provisions of the second section of the act of July 4, A. D. 1836. (5. Sts. at L. p. 527, ch. 362.) Under the act of June 7, A. D. 1832, the pension allowed by it commenced on the 4th day of March, A. D. 1831, but no person was entitled thereto who did not survive the passage of that act. But the second section of the act of July 4th, A. D. 1836, provides that if any officer, soldier, &c., who had served as required by the act of June 7, A. D. 1832, had died between the 4th day of March, A. D. 1831, and the date of the latter act, the amount of pension which would have accrued from the 4th day of March, 1831, to the time

of his death, if he had survived the passage of that act, should be paid to his widow; or, if he left no widow, to his children. To my mind it is clear, that this act was passed under the influence of the then well-understood construction which had been put on the act of 1832. There was the same reason for providing for the widow and children of the officer who survived the passage of the act, but died before asserting his claim, as there was for providing for the widow and children of the officer who survived the period from which the pay commenced, but did not survive the passage of the act. The act of July 4th, A. D. 1836, would doubtless have embraced both cases, if it had not been considered that the former was already provided for by the act of 1832. Not only was this act a *quasi* legislative construction of the act of 1832, but it shows the impropriety and injustice of adopting and acting upon a particular construction of a statute, until subsequent legislation is based upon it or influenced by it, and *afterwards* declaring it to be erroneous. The act of 1828 had received a known construction, and its words were adopted in the act of 1832, because they had already received that construction; and the second section of the act of 1836 was passed because the act of 1832 had failed to provide for a case which came within the equity of the latter act so construed.

My opinion is, that an order should be made, directing testimony to be taken in this case.

Supreme Judicial Court of Massachusetts, Essex, ss. April Term, 1859.

BROWN *v.* PERKINS *et ux.*

It is not true that by the common law any person may abate a common nuisance because it is such.

When a common nuisance obstructs any person's individual right, he may remove it in order to enjoy that right.

Where, by statute, the act of keeping liquors for sale is declared to render such liquor a common nuisance, and by the same statute a mode of abating such nuisance is prescribed, by which the owner of the property has an opportunity to defend his right thereto, the property cannot lawfully be destroyed by way of abating the nuisance, except in the manner so prescribed by the statute.

Where, by statute, the building used for the sale of liquor is also declared to be a common nuisance, the fact that the husband, wife, child or servant of any person frequents such building and obtains liquor there, does not constitute such an injury to such person's private rights as would justify a breaking into the building and destruction of the liquor, but such common nuisance can only be prosecuted in the mode prescribed by law.

The facts in this case will appear in the report of the trial at *nisi prius* before SHAW, C. J. 21 Law Reporter, 106. The case came up for argument at this term on the plaintiff's exceptions to the rulings and charge of the presiding judge at the trial. Mr. Justice BIGELOW read the following synopsis of an opinion to be written out by

SHAW, C. J. This was an action for breaking and entering the plaintiff's shop, and destroying various articles of property.

The defendants, denying the facts, and putting the plaintiff to proof, insist that if it is proved that they were chargeable with the breaking and entering, it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and so was declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the proof shows that it was done; that the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they entered for that purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

A great many points were raised on the report, and argued, upon which the court have not passed; they are all passed over now for the purpose of coming to the main points which are decisive of the case.

The judge who sat at the trial, stated that he ruled the law and directed the jury as stated in the report, subject to the opinion of the whole court, and when many other points were raised, he stated that it might be more convenient to report the whole case, so far as controverted points were presented, for the consideration of the whole court; and this, it was understood, was assented to by the counsel.

Passing over all questions as to the plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not, of themselves, a common nuisance, but the act of keeping them for sale by statute makes them a nuisance, and the only mode in which they can be lawfully destroyed is the one directed by statute for the seizure by warrant, bringing them before a magistrate and giving the owner of the property an opportunity to defend his right to it. Therefore, it is not lawful for any person to destroy them by way of abatement of a common nuisance, and *a fortiori* not lawful to use force for that purpose.

2. It is not lawful by the common law for any and all persons to abate a common nuisance merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never entrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgment of his peers or the law of the land; and no person can be twice punished for the same offence. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the commonwealth in private hands.

4. The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also when a common nuisance obstructs his individual right, he may re-

move it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same.

Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but, we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law.

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance, and the fact that the husbands, wives, children or servants of any persons do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights so as to authorize and justify such persons in breaking into the shop or building where it is thus sold and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside and a new trial had.

Otis P. Lord and *J. W. Perry,* for the plaintiff.

S. H. Phillips, Attorney-General, and *R. S. Rantoul* for the defendants.

Municipal Court of the City of Boston. Nov. Term, 1855.

COMMONWEALTH *v.* MCGARRIGILL.*

An indictment under the Revised Statutes, chap. 130, sec. 10, for selling a book containing obscene language, &c., must either contain an express allegation that the defendant knew that the book contained obscene language, or something equivalent to it.

This was an indictment upon Revised Statutes, chap. 130, sec. 10, which enacts: "If any person shall import, print, publish, sell, or distribute, any book or any pamphlet, ballad, printed paper, or other thing, containing obscene language, or obscene prints, pictures, figures, or descriptions, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school, or place of education, or shall buy, procure, receive, or have in his possession, any such book, pamphlet, ballad, printed paper, or other thing, either for the purpose of sale, exhibition, loan, or circulation, or with intent to introduce the same into any family, school, or place of education, he shall be punished," &c.

The indictment, which contained one count, charged that the defendant "did have in his possession, for the purpose of the sale of the same, a certain book then and there containing obscene language, obscene prints, obscene pictures, obscene figures, and obscene descriptions, manifestly tending to the corruption of the morals of youth, which said book was then and there entitled," &c., setting forth the title of the book, but omitting a statement of its contents, and alleging a reason for the omission by the usual averments.

To this indictment the defendant filed a general demurrer.

ABBOTT, J. This is an indictment under the Revised Statutes, chap. 130, sec. 10, for selling a book containing obscene language, &c. The prisoner demurred to the indictment upon the ground that it was nowhere alleged that he knew that the book contained obscene language. On examination, it appears that there is no allegation in the indictment that the prisoner sold the book described knowing its contents, or with an intent to corrupt public morals, and that it contains no equivalent allegations which might be taken necessarily to amount to knowledge on his part. If it had been alleged that the book was sold with a design

* Bennett and Heard's Leading Crim. Cases, I., 551, note. Reported by F. F. Heard, Esq.

and intent to corrupt public morals, then it might be well held that the design and intent necessarily included knowledge, and was equivalent to an express allegation to that effect, because no one can be held to intend and design to use certain means to attain certain ends, without a knowledge of the means used. This would be in accordance with the adjudged cases. *Commonwealth* v. *Hulbert*, 12 Met. 446. But this indictment contains no such equivalent allegations; none which can in any way amount to a charge of knowledge on the part of the prisoner.

The first question that arises upon this state of the pleadings is, whether knowledge is a necessary ingredient in the offence; because, if the crime is complete without it, by the mere act of selling books which are in fact obscene, although such fact may not be known to the seller, then the allegation in the indictment is sufficient. The argument pressed is, that it was intended, on grounds of public policy, to make the selling of such books, whether their contents are known or not, punishable, and that any one who undertakes to sell books must see to it that he knows what he is selling; and that this is analogous to a class of cases under the revenue laws, where persons may be liable to forfeitures for the doing of acts in which they do not participate, and have no knowledge. But upon a careful examination of the whole subject, I think it is apparent that such is not the construction that should obtain here. Generally, intent, knowledge, is of the very essence of crime, and there must be very strong reasons shown to exist, to take any case out of the application of this general rule. There certainly appear to be no such considerations applicable to the case at bar; and to hold that this offence may be committed by a blind man, who sells books for a livelihood, and who happens, innocently, to sell an obscene publication, would be giving a construction to the statute manifestly harsh, and not required by the rules of law. Many other cases might be put, where it is apparent that the construction claimed would be equally harsh and unjust.

Taking it, then, as settled, that knowledge is necessary to constitute the offence, is the indictment sufficient? There is no more general, useful, logical, safe, and well-settled rule applicable to criminal pleading than this, that an indictment should state every fact and circumstance necessary to constitute the offence intended to be described. 1 Chitty,

Crim. Law, 228; *Commonwealth* v. *Strain*, 10 Met. 521; 2 Gabbett, Crim. Law. 227; Archbold Crim. Pl. 41. That such is the general rule will not now be denied; but it is claimed that an exception exists in case of certain acts, the doing of which is forbidden by statute, and that in such cases it is sufficient to allege simply the doing of the acts complained of; and certainly there are expressions in some of the elementary writers of authority, which sustain such a position. I apprehend, however, that if any regard is paid to the logic of, or the general rules governing in criminal pleadings, that this exception must be held to apply only to those cases where the doing of the act made an offence, necessarily implies and includes a knowledge of its criminal character, and also the criminal intent. With this qualification, the position is undoubtedly correct; but it is certainly against both authority and reason to extend it to those cases where the mere act itself is not sufficient unless the criminal knowledge and intent exist. Nor can the argument prevail, that in this case want of knowledge is a matter of defence, to be shown by the prisoner. When criminal knowledge is necessary to constitute an offence, the burden of showing it is always on the government. Undoubtedly, in general, proof that a person sold obscene books would be sufficient *prima facie* evidence of knowledge, and the defendant would be required to overcome it; but still the duty would be on the government to prove the *scienter*, the mere production of *prima facie* evidence not changing the burden of proof. Upon the whole, testing this case by the well-settled rules of criminal law, and the reason and the logic of those rules, I am satisfied that knowledge is necessary to constitute the offence in question, and that it being so, it is essential that the indictment should either contain an express allegation of such knowledge, or something equivalent to it.

Judgment arrested.

Superior Court for the County of Suffolk.

HAWES *v.* MITCHELL.

It seems that no actual notice to a creditor of the existence of a lien on a ship under St. 1855, c. 231, will, as to such creditor, dispense with the necessity of the record and oath required by § 2 of that statute.

If actual notice could have this effect, it must give the creditor all the information which he could obtain by the record.

The attachment of the vessel at the suit of the party claiming the lien, is not a notice to parties interested which gives such information.

Action of contract was brought for the price of materials furnished in constructing a ship according to an account and a petition annexed. The "petition" contained no prayer, but was a statement of certain facts and an allegation of a lien arising therefrom. *Held*, that an amendment changing the action at law into a petition for the sale of the ship under St. 1855, c. 231, was beyond the power of the court, as changing not the form but the nature of the action.

In a proceeding under St. 1855, c. 231, creditors claiming liens, who are admitted as parties upon notice, according to the provisions of the statute, may make any objections to the claim of the original petitioners, though the effect be to dismiss the whole proceeding.

The facts in this case sufficiently appear in the opinion of the court, delivered, substantially, as follows, by

ALLEN, C. J. In the form which this action has assumed since the proceedings were amended at the November term, 1856, it presents itself as a petition under St. 1855, c. 231, for an order of court directing the sale of the ship *Orpheus*, for the payment of the amount of the petitioners' lien upon the ship for materials furnished in its construction.

For the purposes of the trial, the furnishing of the materials and the original creation of the lien are admitted, but the parties who oppose the petition contend that by a failure on the part of the petitioners to comply with certain provisions of the statute of 1855, their lien has been dissolved, and that for this and other reasons they are not entitled to the remedy they seek.

Section 5 of the statute referred to, provides that "such lien shall be dissolved, unless the person claiming the same shall file, within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted, in the office of the clerk of the city or town within which such ship or vessel was at the time the debt was contracted, a statement subscribed and sworn to by himself or some person in his behalf, giving a just and true account of the demand claimed to be due him, with all just credits, and also the name of the person with whom the contract

was made, the name of the owner of the ship or vessel, if known, and the name of the ship or vessel, or such description thereof as shall be sufficient for identification; which statement shall be recorded by the clerk of such city or town, in a book kept by him for that purpose."

It is agreed that such statement has never been filed, and that the vessel did, in fact, sail in March, 1856, soon after the commencement of the original process in this case.

To obviate this difficulty, the petitioners rely upon the fact, that before the sailing of the vessel, the writ in this case was issued, and the ship was attached by a sheriff and held by him until the attachment was dissolved, a bond to respond to the judgment having been given pursuant to law; and it is contended that the commencement of this suit and the subsequent proceedings constituted a notice to all persons interested, and was equivalent to the required record. The argument of the petitioners rests upon a supposed analogy between the present case, and the decisions which have been made by courts upon the effect of actual notice upon subsequent purchasers, in the case of unrecorded deeds of real estate. The objection to it is twofold. In the first place, the decisions which establish the sufficiency of actual notice in the case of unrecorded conveyances of real estate, have never been extended to the transfer of personal property. In the second place, it does not appear that any such notice has been had. If any notice to parties could remedy the omission to comply with the provisions of the statute, it certainly must be actual and not constructive notice, and it must communicate to all parties interested substantially the same information which the record would afford. It must give to the parties in interest information of the amount of the demand, the names of the contractor, of the owner of the ship, &c., &c. The possession of the vessel by an officer, however open and notorious it may be, does not communicate this information. If it is replied, that an examination of the records of the court will supply that deficiency, the answer is, that parties interested in the property are not presumed or bound to inspect those records. A record in the Registry of Deeds has, by law, the effect of notice to all. But all are not expected to have knowledge of the records of courts respecting suits between parties. There is no presumption of notice. None, except those who have special notice, and those who are voluntarily parties to

a suit, are presumed to have any knowledge of its institution or progress. These claimants who now oppose the prayer of the petitioners, are not such parties. The proceedings were commenced against the contractor, and not until long after did these parties claiming a lien of their own, come into the case, in pursuance of notice given under the statute.

Take, for example, the case of the levy of an execution upon land. Appraisers are chosen, who go upon the land, and the whole proceedings are certainly as public and notorious as the attachment of a vessel by the sheriff; and yet it would hardly be contended that, as against other creditors, this would obviate the necessity of recording the same within three months in the registry according to law.

The case of *Denny* v. *Lincoln*, 13 Met. 200, not cited in the argument, appears to us to be conclusive of this case. Chief Justice Shaw, in that case, says: "We are inclined to the opinion that an attachment would hold against an unrecorded mortgage of personal property, although the attaching creditor had notice of it, if it were necessary to decide that question. But if such notice is sufficient, it must be full, clear and explicit — it must express the amount for which the property is bound, and generally it must give substantially the same information as would be given by an inspection of the deed."

If such is the rule in the case of a written mortgage — if notice would be required of all the particulars which could have been learned from the record, *a fortiori*, would it apply to the case of a statute lien, not created by writing but merely arising from certain facts? And the records in this case, even if these parties were presumed to know them, do not afford the required information. It seems clear to us that no (verbal) notice can dispense with the necessity of the record and oath which the statute requires.

It is, moreover, urged against the petitioners, that the action was not rightly instituted. Though this is now immaterial in this case, yet, as a point of practice, the court thinks it well that it should be decided.

The proceedings were commenced in the common form of an action of contract. The petition was annexed to the writ, but had no other connection with it than that of the wafer which joined the papers. Moreover, although referred to as a petition, it prayed for nothing, being merely a state-

ment of facts and an allegation of a lien arising therefrom. It seems that the plaintiff subsequently amended his writ, so that the defendant was called upon to answer "to the petition" instead of "in an action of contract," and also by adding a prayer for a sale of the ship. It is claimed by the defendants, and we think correctly, that the court could not have intended to allow such an amendment — that it is one which they have no authority to allow, as it changes an action at common law into a petition under a special statute for a sale, and that consequently all that can now be considered before the court, is the action at law, as originally brought. The case of *Hayward* v. *Hapgood*, 4 Gray, 437, we think, is decisive of the point that the statutes authorizing amendments in the form of action, do not extend to a change of their entire nature from law to equity, or *vice versa*.

The petitioners also claim that their opponents are admitted as parties in this case, for the purpose of defending and enforcing their own lien only, and not to make objections which shall quash the whole proceedings, where the owner of the property makes no opposition to the sale prayed for. But the statute expressly provides that creditors coming in upon notice in this manner, may not only defend their own claim, but may contest the claim of any other creditor. It may well be, that as proceedings have been commenced in the United States courts against this vessel, these parties may fear some conflict of authority, and prefer to prosecute their claims there. However this may be, they are rightfully here, and have a right to make whatever objection they can, though the effect may be to put an end to the whole case.

Petition dismissed.

S. C. Maine, for plaintiffs.

E. H. Derby, for owners.

E. F. Hodges, for claimants.

EDWARDS *v.* CHISM, WEEKS, TRUSTEE.

Under the provisions of St. 1844, c. 148, an attaching creditor cannot take issue on the validity of a mortgage and thereby rescind a contract with which the parties are satisfied, unless under an allegation that the same was made in fraud of creditors.

This was an action of contract, in which the personal property of the defendant, subject to a mortgage to one

Carter, and by him assigned to the trustee, Weeks, was attached by mesne process while said property was in the possession of the defendant, who was the mortgagor. Said Carter and Weeks were summoned as trustees in said suit, and made answers therein. The trustee, Carter, was discharged. The plaintiff denied the validity of the mortgage and moved that the same be tried by a jury, and, by the direction of the court, filed his allegations by way of tender of an issue against the validity of the mortgage. The court refused to order a trial on said allegations, on the ground that the parties to the contract of sale between Carter and Chism, having long acquiesced in its validity, and having never sought to rescind it on either side, no issue upon its validity as between them could be raised in this action. There being no allegation that the sale from Carter to Chism was made to defraud creditors, and no other objection being made to the validity of the mortgage in the hands of the trustee, the court held that, under the provisions of St. 1844, c. 148, the aforesaid issue could not be raised by the plaintiff in this action.

Wakefields, for plaintiff.

Wm. Hilliard, for trustee.

MATHEWS *v.* ALLEN. (NISI PRIUS.)

Note payable on demand — Promise by endorser after sixty days, in ignorance of law — Waiver of demand and notice.

The plaintiff held the note of a corporation, payable on demand, endorsed by the defendant. No demand or notice was made within the sixty days, long after which the corporation went into insolvency.

There was evidence tending to show that after the expiration of the sixty days, and before the insolvency, the defendant, with a full knowledge of the facts that no demand or notice had been made or given, promised the plaintiff that if the corporation did not pay the note, he would. The defendant testified that he had no knowledge of the statute which makes requisite the demand within sixty days, in order to hold the endorser.

On this evidence the jury were instructed as follows, by

ALLEN, C. J. If the plaintiff, with a full knowledge of the facts that no demand had been made upon the corpora-

tion, and no notice of non-payment had been given to him as endorser, and with a knowledge of all other material facts, and without being misled by the plaintiff in any particular, promised the plaintiff to pay the note in suit, long after the expiration of sixty days from its date, he cannot now take advantage of the want of demand and notice, on the ground of ignorance of the law. The original consideration will sustain the new promise.

The jury returned a verdict for the plaintiff, and the defendant excepted to the above instructions.

H. F. Durant and *Geo. H. Preston*, for the plaintiff.

A. A. Ranney and *J. H. Butler*, for the defendant.

WETHERBEE *v.* BAKER, ET AL.

Usury — sale of note by endorser.

This was an action by an endorsee on a promissory note for $500, with interest, signed by Mary Baker, and endorsed by Eliphalet Baker. The declaration contained two counts, one against the maker and one against the endorser. The defendants filed a joint answer, in which the only defence set up was that the defendant, Eliphalet Baker, received but $280 for the note of $300, when he endorsed it to the plaintiff. The answer alleged that this was usurious, and claimed that the plaintiff should forfeit under the statute threefold the amount ($20) of the usurious interest alleged to have been reserved. To this answer the plaintiff demurred.

Held, Morton, J. delivering the opinion of the court, that the demurrer was good. That there was no answer whatever as to the maker, Mary Baker, for even if there were usury between the endorser and the endorsee, it was well settled that this was no defence in an action against the maker. With regard to the endorser, Eliphalet Baker, it was alleged that he received only $280 for the note, but there was no allegation that the transaction was a loan and not a *bona fide* sale of the note, and the court held that in a *bona fide* sale for a sum less than its face, of a note bearing interest, though accompanied by an endorsement rendering the seller liable in case of non-payment by the maker, there was nothing sufficient to constitute usury. The plaintiff therefore, taking the facts alleged in the answer to be true, was entitled to judgment against both defendants.

Tuxbury and *Crocker*, for plaintiff.

A. A. Dame, for defendants.

Probate Court. Suffolk. August, 1858.

IN THE GOODS OF ARTHUR WHITE, DECEASED.

Nuncupative will — Attesting witness.

Arthur White, a seaman of the merchant ship Medford, bound from Calcutta to Boston, died at sea on the fifth of July, 1858. On the morning of the second, he, being then mortally ill, called to him one of his shipmates, named Adams, and said to him: "Tom, there is the chest, take them things what you like, and the rest give to the rest of the chaps; and all that money what belongs to me, divide among the rest of you, the ten or eleven of you: nobody here on board knows my proper name, or where I belong. I know I got to die." Another seaman named Gnoykè, was accidentally present, and heard these words; but he was not requested by White to attest them, nor was he sure that White knew of his presence. The words having been reduced to writing out of court, were presented for probate, as a nuncupative will, by an attorney, at the request of the legatees; and after notice, the petition came on this day for hearing; Adams and Gnoykè alone, being offered as witnesses to prove the alleged nuncupation.

F. E. Parker, in support of the petition. The Revised Statutes ch. 62 § 7, provides that "nothing herein contained, shall prevent any soldier being in actual military service, nor any mariner being at sea, from disposing of his wages and other personal estate, by a nuncupative will, as he might heretofore have done;" that is, as he might have done by the statute last in force, before the passage of the Revised Statutes. This was St. 1783, c. 24, which contains (§ 6,) an exception to the same effect, in favor of soldiers and mariners, leaving their right to make a will, as it stood by the Provincial act, 4 Gul. and Mary, c. 9, (A. D. 1693), and this act again repeats the exception; which, in all the three acts is in substance borrowed from the Statute of Frauds 29, Car. I., c. 2.

The law, therefore, governing this case, is the common law, as it stood before the Statute of Frauds. And the common law as it regulated wills, had not been much changed at that time from the unlettered ages when it had its origin, and when most men could only make a will by words or signs.

To entitle the petitioner to this indulgent rule, he must prove four things. 1. That the alleged nuncupation is made by a person entitled to the privilege. 2. That the declarations of the deceased, if proved, constitute a will, 3. That these declarations are proved by a sufficient number of competent witnesses. 4. That they are before the court in proper form.

1. The deceased is entitled to the privilege, as "a mariner, being at sea." It has been said in New York, that even with soldiers and sailors, the right is not unqualified, but can be justified only on the plea of necessity, and be tolerated, if made *in extremis*. Dayton on Surr., p. 121; *Hubbard* v. *Hubbard*, 12, Barb., 1556. But this is opposed to the main reasons for granting them the indulgence, namely, that from their exposed and rude employments, they are frequently without the education, materials, and opportunity of writing. And in the late case *Exparte Thompson*, 4 Bradf., 160, the learned surrogate decided that "it was never held requisite that their wills [those of soldiers and sailors,] should be made during their last sickness." But the will now offered to the court, having been made in the testators last illness, and but three days before his death, may well be maintained to come within the most restricted construction of the privilege.

2. The words constitute a will. It is hardly necessary to state that no form of words is needed for a valid nuncupative will. "Their form (*Merlin* cited in *Exparte Thompson*,) is to have no form," and Swinburne says, IV., 29, "As to any precise form of words, none is requisite, neither is it material whether the testator speak properly or unproperly, so that his meaning do appear." Considering, also, that these were the declarations of a mariner presumed to be acquainted with his privilege in declaring a will, and that they were made to other mariners having the same knowledge, (4 Selden, 196,) there can be no doubt that they meet Blackstone's definition of a will, — "a legal declaration of a man's intentions, which he wills to be performed after his death." (2 Bl. Com, 500).

3. The will is proved by a sufficient number of competent witnesses. Swinburne says, (I. 13,) "Two witnesses are needful, and again, two are sufficient; so that as it is not necessary to have more than two; so it is vain to have no more than one;" and this number, he adds, is both fixed by

the laws and customs of the realm, and is *juris gentium*, (See Dayton on Surr., 185; 1 Lomax on Ex'rs, 37; 1 Salk., 396. *Military Testaments*, however, were entitled to peculiar privileges; "the principle of the exception was borrowed from the civil law, and in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to." *Drummond* v. *Parish*, 3 Carter, 531. And from the authorities there collected, it would seem that a military testament could be established without witnesses. But are the wills of merchant seamen within the privilege of military testaments? They are named in the same exception by the Statute of Frauds, but this saves to the two classes the right to make wills as they had done before the act; and does not, in terms, confer on either class any new right or power. And Swinburne in his enumeration of privileged testaments, (p. 61,) makes no mention of those of mariners. And yet, in the last two cases reported in this county, the wills of seamen are held to come within the reason, and the rule of the military testaments. The Supreme Court of New York, (4 Selden, 196,) say that "the rules which are to be observed, in making wills, by soldiers and mariners, are the same by the common law." And in *Exparte Thompson*, before cited, the will of the cook of a merchant steamer was held to be within the reason of military testaments. These cases contain the law as now settled, and the latter case, the surrogate adds, "In respect to evidence, we do not follow the civil or the canon law; no particular number of witnesses is required, to verify an act judicially, and all that the court demands, is to be satisfied by sufficient evidence as to the substance of the last testamentary request, or declaration of the deceased." Probate was granted on the testimony of one witness.

But are these witnesses *competent*? Both are legatees directly interested, both at the time of the attestation, and of the proof. The Rev. St., c. 62, § 8, of course does not apply to them. And at common law the legatee, though incompetent as a witness to prove a will of personalty, might be rendered competent by tender, payment, or release, (1 Burr., 464, Str. 1253, Swinb. on wills, IV., 11; Siderf. 315, St. 4; Arm. 16, 14; *Brett* v. *Brett*, 3 Addams, 229; *Linton and al.* v. *Lace*, *ib.* 213). And if the court considers that interest, under our present statute, disqualifies either of these witnesses, Gnoyke will release his legacy, and be offered as the sole witness.

But St. 1852, c. 57, § 60, provides: — "No person offered as a witness shall be excluded from giving evidence, either in person, or by deposition, in any proceeding civil or criminal, in any court, or before any person having authority to receive evidence, by reason of incompetency from crime or interest." * * * "But nothing herein contained shall be deemed applicable to the attesting witnesses to any will or codicil." — This makes a legatee competent, unless he is an *attesting witness.*

An attesting witness is one who assists at the solemnity of attestation; and this solemnity consists in the person performing an act, or executing an instrument; choosing and calling upon one or more persons to see what passes, and to remember it; and in such persons acting in conformity with the request. It is not necessary that the witness should subscribe as well as attest, nor that the subject of attestation should be the execution of a paper. Both were dispensed with by the attesting witnesses to livery of seizin, 1 Steph. Com., 459, and to certain nuncupative wills made under the Statute of Frauds. The attestation of written wills is borrowed from the civil law (Lomax Exr's., 54,) and Domat (Cushing's Transl., § 2035,) says, "The witnesses to written acts are persons whom one has the liberty to choose to be present at them, and they ought to be in the number required by law, and of the quality which it prescribes, whereas in the proof spoken of in this chapter, the witnesses are persons who happen by chance to have knowledge of the facts, which one would prove without having been chosen, or called upon to see what passed and to remember it." Lord Camden says (*Hindson* v. *Kersey*, 4 Burn's Ec. Law, 100, 8th Ed.,) "The new thing introduced by the statute is the attestation, for what is the clause but a description of those solemnities that are to attend the execution?" And these witnesses have peculiar duties and privileges; — "Their employment is to inspect and judge of the testator's sanity before attestation. If he is not capable, the witnesses ought to remonstrate and refuse their attestation; in all other cases they are passive, here they are active, and in truth the principal parties to the transaction." (*Camden C. J.*, ante,) 3 Wash. C. C. Rep., 587. And they are permitted to testify as to their opinion of the testator's sanity. 2 Greenl. Ev., § 691, 2. It is by their testimony, primarily, that a will must be proved. 3. If

they be dead, their signature to the will or deed may be proved, and no testimony of their declarations to the contrary is admitted. 1 M. and W., 622. And however some of these duties and privileges may be created by statutes, there can be no doubt that some of them attach to and distinguish a class of witnesses, and that this class, and no other, are called *attesting* witnesses.

The witness Gnoykè does not come within this class; "he happened, by chance, to have knowledge of the facts." He is, therefore, free from the disability of interest. And as no *rogatio testium* is necessary, (Swinb. I., § 12; 2 Greenl., 298; 4 Seld., 196) he is a competent witness.

Is this will in the proper form? Swinb. I., 12. "The use is to prove it by witnesses, and then to write it." Bac. Abr. "Wills," D. "Being after his death proved by witnesses, and put in writing by the ordinary." And so in New York, (by statute,) Dayton on Surr., 185. But it is immaterial, however, by whose hand the nuncupation is reduced to writing, and the only inquiry for the court is, whether the written paper conforms to the declaration of the witnesses.

AMES, J., admitted the will to probate on the testimony of Gnoykè alone, without a release of his legacy; stating his opinion that he was not an attesting witness, within the meaning of the statute.

RECENT ENGLISH CASES.

V. C. Kindersley's Court.

Re Don's Estate.

Son born of Scotch parents before their intermarriage — Inheritance by father to illegitimate son, under 3 and 4 William 4, C. 106.

A and B, Scotch domiciled subjects, cohabited together, and C, a son, was born to them. They soon after intermarried, and the son was thus legitimatized, according to the law of Scotland. C afterwards acquired lands in England, and died intestate and unmarried, in the lifetime of his father.

Held, that although the son was legitimate by the law of the place of his birth and of the domicil of his parents, and this *status* was recognized by the law of England, yet he was not legitimate in the sense required by the English law of inheritance. See *Birtwhistle* v. *Vardill,* 9 Bligh, (N. S.) 32; S. C., 2 Cl. and Fin. 571.

Nor could his father inherit to him by force of statute 3 and 4 William 4, C. 106, § 6, which enacts, "That every lineal ancestor shall be capable of being heir to any of his issue," &c.; for "issue" here means issue capable of inheriting according to the law of England.

Southgate *v.* Clinch.

Will — Bequest of personalty to "next heir at law."

Testator bequeathed a sum in stock to his wife for life, "and afterwards to my next heir at law," without more. *Held,* that the testator's heir at law, and not his next of kin, was entitled; and that he who was heir at the testator's death, and not at the death of the widow, should take.

V. C. Stewart's Court.

BROOK *v.* BROOK.

Marriage with deceased wife's sister — Conflict of laws — Marriage between English subjects celebrated in foreign countries.

By statute 5 and 6 William 4, C. 54, rendering void marriages within the prohibited degrees, which before were voidable, it is enacted (§ 2) that "all marriages which shall hereafter be celebrated between parties within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." A marriage was celebrated in Denmark, between a widower and the sister of his deceased wife, both parties being at the time domiciled in England.

Held (by the Vice Chancellor, assisted by Creswell, J.), that the marriage was void in England, although by the law of Denmark such a marriage is allowed. That the rule of the *lex loci* does not apply to a contract prohibited by the positive law of the country of which both parties are subject.

Court of Appeal in Chancery.

Before the Lords Justices.

Ex parte YATES, *re* SMITH.

Joint and several promissory note — Subsequent addition to.

Proof was offered in bankruptcy against the estate of one of the makers of a joint and several promissory note, payable to the plaintiff on demand, with interest. It appeared that after the note had run for some years, the plaintiff wished to call it in, and the maker, against whose estate it is now offered, undertook to get additional security as a guaranty, and procured a fourth person to sign the note, which he did in the left hand corner, with the date of his signing.

Held, (reversing the decision of Mr. Commissioner Fane,) that the new signature was in fact an endorsement, and did not invalidate the note, [as it would have done, if a new direct promise, for want of a new stamp.]

Ex parte THE UNITY JOINT STOCK MUTUAL BANKING ASSOCIATION.

Bankruptcy — Proof of debt contracted by infant under false representation of age.

The bankrupt executed a bond to secure certain advances to himself and his partner, and made a representation, and also solemn declaration in writing, preliminary to effecting an insurance upon his life, which was to form part of the security for the advances, that he was twenty-two years old. He was, in fact, still a minor, and after attaining full age, he became bankrupt.

Held, (affirming the decision of the Commissioner,) that the fraudulent misrepresentation had rendered the trader, although an infant, liable in equity, and that the debt was provable against his estate in bankruptcy.

AUSTEN *v.* BOYS.

No "goodwill" of partnership between solicitors.

The "goodwill" of a business is the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It is wholly inapplicable to the profession of a solicitor, which has no local existence, but is entirely personal.

House of Lords.

BARTONSHILL COAL COMPANY *v.* REID.

Master and servant — Liability of master to injury of servant by fellow servant.

In this case the House of Lords affirmed, as founded on sound principles, and extended to Scotland, the cases in the Exchequer Chamber, which decide that a master is not liable to his servant for injuries resulting from the carelessness of a fellow servant, engaged in the common employment, if the servant in fault were not shown to be unfit or incompetent for his employment.

The Lord Chancellor (Cranworth) referred with approbation to the "very able judgment" of SHAW, C. J., in *Farwell* v. *The Boston and Worcester Railroad Corporation,* 4 Met. 49.

Exchequer Chamber.

WHEELTON *v.* HARDISTY.

Life assurance — Warranty or representation.

The plaintiff, being interested in the life of A, procured insurance thereon of the defendants, and referred to a proposal made by A and others, not the plaintiffs, in which the state of his health was falsely and fraudulently misstated, but there was no fraud or wilful misstatement by the plaintiffs.

Held, (overruling the judgment of Q. B.,) that the recital in the proposal was a representation only, and not a warranty.

WARBURG *v.* TUCKER.

Bankrupt — Certificate — Whether a covenant is discharged.

The defendant, by deed, assigned to the plaintiff certain policies of insurance upon lives, and covenanted to pay the annual premiums, and that in case of his neglect to do so, it should be lawful for the plaintiff to pay them, and he would, on demand, repay the same to the plaintiff. To a declaration upon the covenant, assigning as breaches, first, that the defendant did not pay certain premiums, and second, that the plaintiff had paid them, and the defendant refused to repay them, the defendant pleaded his certificate in bankruptcy, obtained after the deed, and before the breaches.

Held, (affirming the judgment of Q. B.,) that the certificate was no answer to the first breach.

Whether or not it was a good answer to the second breach, was not decided.

Common Bench.

WESTLAKE *v.* ADAMS.

Contract — Consideration.

The defendant applied to the plaintiff to take his son as an apprentice, and agreed to give 40*l.* premium, but insisted on 20*l.* consideration to be stated in the indenture, which was done, and the indenture was executed, and the son

served out his apprenticeship with the plaintiff, and was boarded and lodged by him during the whole time. The defendant paid 20*l.* in cash to the plaintiff, and gave his four I O U's, of 5*l.* each, for the other 20*l.* Upon a subsequent settlement of accounts a new I O U was substituted for the balance remaining due on the four. The indenture of apprenticeship was void, under the statute of Anne, for not stating the true consideration.

Held, by WILLIS and BYLES, JJ., (WILLIAMS, J., dissenting,) that the plaintiff was entitled to recover, and that the case was distinguishable from *Warwick* v. *Jackson*, 1 T. R. 121.

Queen's Bench.

HALL *v.* WRIGHT.

Promise to marry — Excuse for non-performance — Disease.

To an action upon the breach of a promise to marry within a reasonable time, the defendant pleaded that before breach, he became afflicted with dangerous bodily disease, which occasioned severe bleeding from the lungs, and by reason thereof he became, and still is, incapable of marrying without great danger of his life, and unfit for the married state, whereof the plaintiff had notice before action, (but no averment that it was before breach.) The plea was proved, with the exception of the allegation of notice.

The court were equally divided upon the question whether the judgment ought to be entered for the defendant.

[To be continued.]

NOTICES OF NEW PUBLICATIONS.

COMMON BENCH REPORTS. New Series. Cases argued and determined in the Court of Common Pleas, and in the Exchequer Chamber, from Trinity Vacation, 1857, to Hilary Term, 1858. By John Scott, Esq. Vol. III. Philadelphia: T. & J. W. Johnson & Co. 1859.

The publishers of this excellent series announce that they have made arrangements by which it will be still further improved, so that the reports of each court will contain also those cases which shall have been decided in the House of Lords, on appeal from that court, up to the time of publication. The reprints are issued with great promptness and at a cheap rate, and are the most useful volumes of reports which a lawyer can have, next to those of his own State or of States whose code or form of proceedure is similar to that under which he practices.

OBITUARY NOTICE.

(From the Law Times.)

Mr. Commissioner Phillips.*—It is our painful duty to record this day the death of Charles Phillips, Esq, the eminent barrister, whose name had so long been connected with the criminal bar in London, previous to his appointment to the post which he held at his decease, viz., that of a Commissioner of the Insolvent Court. That melancholy event happened at his residence in Gordon-square, on the evening of Tuesday, the 1st March, in the seventy-third year of his age, the learned gentleman having never rallied from a sudden attack of apoplexy which had seized him on the previous day, like the lamented old Justice Talfourd, in the discharge of his public duties as a law officer of the Crown.

Charles Phillips was born in the year 1786 at Sligo, in Ireland (where his father, we believe an Englishman, was a collector of customs), and entered the University of Dublin at an early age. His college honors were not so great as some of his distinguished fellow-students, but after graduating respectably he was called to the Irish bar. In those days there were great contests in the forum of the "four courts," and reputations were made which form part of the history of oratory. Mr. Phillips was a man of excitable temperament, and adopted at once, and to an extreme, the style which pervaded the efforts of the public speakers of Ireland. Indeed, he almost originated a school of eloquence, which has been both seriously and jocularly identified with his name. At times, no doubt, it had the character of being something *outré*, but there are passages in the speeches in *Guthrie* v. *Sterne*, and *Blake* and *Wilkins*, and *Judge* and *Berkeley*, which we now may hope in vain to see rivalled at the bar of either country. A little more of his style, perhaps, would not be lost on the interests of oratory, and possibly would make the bar more respectable, as orators, in the eyes of the advocates of Europe. After a career of considerable distinction as an orator at the bar of Ireland, Mr. Phillips, perhaps wrongly, decided on becoming a member of the English bar, and was called by the Middle Temple on the 9th February, 1821. His reputation had preceded him, and like all of his profession

> —— whom Phœbus, in his ire,
> Had blasted with poetic fire,

the majority were prepared to receive him with disparagement. Nevertheless, Mr. Phillips continued to attract attention as an advocate. He had imported into England (at however long an interval) the style of Curran, of whom he was the personal friend; and the important fact became known that Charles Phillips gained verdicts, and that he was a "winning counsel." Oratory at the bar, however, is as dangerous a reputation for an advocate as desperate skill for a surgeon. Where the case was "plain-sailing" the attorneys gave the briefs to their connections; where there was "nothing for it but a speech," the brief was sent to Counsellor Phillips. The growth of this professional character induced the late gentleman to go to the criminal bar, a pursuit which, by the way, we rejoice to say is advancing in the estimation of the public. How criminal practice should have been highest in France and lowest in England, we could never understand, except on the principle laid down by the late distinguished person of whom we write, when he said, "I have sat in the Insolvent Debtors' Court three years, after practising at the Old Bailey

* In Vol. XII. of the Law Reporter our readers will find a full account of the celebrated Courvoisier case in many of the most important articles from the English journals on both sides of the controversy.

for a quarter of a century, and I come to the conclusion that people care more for their money than they do for their lives." At the bar of the Central Criminal Court Mr. Commissioner Phillips was engaged in some of the *causes célèbres*, and competent judges decided that in his office and position he had been equalled by very few in forensic eloquence. The case in which he was engaged which attracted most attention (partly from extraordinary accident, but chiefly from private malice exercised against Mr. Phillips, on the ground of his exertions against a notorious defaulter), was that of *Reg.* v. *Courvoisier*, tried at the Central Criminal Court on the 21st June, 1840, in which the prisoner was charged with the murder of Lord William Russell, on the night of the 7th of May, in Norfolk-street, Park-lane. The persistence of a weekly paper in asserting charges against Mr. Phillips, after the *Times* had publicly abandoned them, led to inquiries, which made the *animus* apparent, and the results of which were made public at the time. The charge was that, after the prisoner had volunteered a confession of his guilt, Mr. Phillips had adjured the Deity, attesting his belief in Courvoisier's innocence, and had endeavored to cast the blame on other parties. Those who publicly declared that Mr. Phillips never used these words of obtestation were persons of some mark, and, at all events, of as much credibility as his accusers. They were the late Lord Chief Justice Tindal and the present Lord Wensleydale. With respect to the doubt said to have been cast by Mr. Phillips on the servant-maid, those who wish in honor and in candor to know the full truth, had better consult the masterly analysis of the advocate's position given in the *Law Review* for March, 1850, under the title of "The Mystery of Murder and its Defence," and while they acquit Sarah Manser of all guilt, those who think that the advocate was not justified, by probabilities, in the course he took, have little notion either of the ethics or the responsibilities of advocacy. As to the appeal to the Deity, we quote the words attributed to Mr. Phillips by the *Times:* "The Omniscient God alone knew who did this crime. He (Mr. Phillips) was not called on to rend asunder the dark mantle of the night, and throw light on the deed of darkness. They were bound to show the prisoner's guilt — not by inference, by reasonings, by that subtle and refined ingenuity which he was shocked to hear used in the opening address of his friend — but to prove it by downright, open, palpable demonstration. What said Mr. Adolphus and his witness Sarah Mansur? and here he would beg the jury *not to suppose for a moment that . . . . . he meant to cast the crime on either of the* FEMALE SERVANTS," etc. etc.

This, then, is the passage on which the charge so pertinaciously made against the deceased orator is founded. The *Morning Herald's* report runs: "But let me do myself the justice, and others the justice, of now stating, that I do not cast the blame on the female servants." The reports of the *Post* and the *Chronicle* are substantially the same, except that the *Post* goes further, and says that Mr. Phillips begged the jury to believe that he did not "in the least degree seek to cast the crime on any of the witnesses." On such grounds as these a slander has survived, the existence of which disgraces the profession of the press. The eloquent lips of him of whom we write are closed, and the speaking eye is glazed on earth forever, but we do ourselves the honor to speak of him the truth — the only defence he ever needed. The sum of this question of the Courvoisier trial we take from the analysis of the case in the *Law Review*. It is the testimony of another judge, in addition to the two whose names we have mentioned. It is the result of an examination of the question by a man whose strict conscientiousness even exceeds his admitted genius, and whose judicial mind is suitable to both — a man who entered on the de-

fence of Mr. Phillips without any inducement but the desire of doing justice, and who, as we believe and know, transferred not a little of the enmity of some of Mr. Phillips's enemies to himself. The summing-up runs thus: —

"After a long and dispassionate and a thorough investigation into all the facts on which the pertinacious accusation against him is professedly based, we have come to the conclusion that Mr. Phillips's conduct has been from first to last most cruelly misrepresented with reference to his defence of Courvoisier.

"We have watched every turn of the case, and have seen in this gentleman's conduct of it nothing inconsistent with honor, or calculated to do anything but reflect credit on that great Profession of which he has been so long one of the most brilliant ornaments. We doubt whether his position, at and after the paralyzing confession to him of his client's guilt, has a parallel in the annals of advocacy. Every presumption should surely be made in favor of one suddenly placed at such a desperate disadvantage. But Mr. Phillips needs not the aid of presumptions. Most fortunately for him, his defence against these cruel and persevering accusations rests on evidence irrefragable — that of two witnesses — in the late distinguished Chief Justice Tindal, and the present equally distinguished Baron Parke (Lord Wensleydale), each in himself a host of consummately qualified witnesses. It is impossible to rate human testimony higher than that which exonerates Mr. Phillips from those sedulously circulated charges of cruelty and impiety which we believe to be now finally disposed of. And to those who have originated and perpetuated that charge, we recommend a more strict obedience to both the letter and the spirit of the Divine commandment, 'Thou shalt not bear false witness against thy neighbor.'"

These are the words of Mr. Samuel Warren, Q. C., M. P. for Midhurst, the Recorder of Hull, and whose testimony, as far as personal integrity is concerned, may rank with that of the eminent judges we have named; his knowledge of human nature it is possible that the world at large may rank even a little higher.

Mr. Phillips was appointed during the Chancellorship of Lord Brougham to the District Court of Bankruptcy at Liverpool, where he presided until about fourteen years ago, when he was transferred to the Insolvent Debtors' Court of London, on the appointment of Mr. Commissioner Pollock to a judgeship at Bombay. Mr. Commissioner Phillips retained throughout his life a strong predilection for literary pursuits. He distinguished his studentship by a romantic novel, and followed it up by a poem of no inconsiderable merit, "The Emerald Isle." By his speeches, however, he will be judged. They have been republished in America and the British colonies, and if the taste is florid there is no sentiment in them of which the orator need have been ashamed. The most interesting of the writings of Charles Phillips was his "Recollections of Curran," a very genial book on a great subject. It wanted the Boswellian daguerreotype, but still it gave some notion of the triumphs of the "man with the face of a peasant," and was needed to supply the modest omissions of the work of the illustrious orator's own son. As a judge of the Insolvent Debtors' Court, Charles Phillips was admitted to possess acuteness and integrity, and to do justice. His last literary production was a work on capital punishment, which he dedicated to his old friend and fellow-student, Dr. Giffard. The career of Charles Phillips was that chiefly of an advocate, but he was greatly endeared to those who knew him by his inexhaustible fund of anecdote and his power of applying instances. Whatever estimate may be formed of his ability, there must have been great power of attaching friends in the man who was admitted to the personal intimacy of Brougham and of Curran.

INTELLIGENCE AND MISCELLANY.

THE EXAMINATION OF WITNESSES IN EQUITY. In view of the able article on this subject, which appeared in a late number, our readers may be interested in the following notice, from the Law Times, of a pamphlet just published in England, on the same subject, in the form of a letter to Lord Lyndhurst:

Although the law now permits the use of *viva voce* evidence in the Court of Chancery, it is notorious that the utmost aversion to it prevails, both with judge and counsel, and hence the comparative infrequency of its employment. Still they adhere with pertinacity to the old form of evidence by affidavit, spite of its patent absurdities and flagrant abuses. The reason of it is, no doubt, to be sought in the force of habit, and the consciousness of incapacity. Equity lawyers are not educated in the law of evidence, which cannot be learned from books, and can be mastered only by an apprenticeship to practice. It is ludicrous to see how a witness fares in the hands of an equity counsel — how difficult in him appears to be the work, which to an experienced common law advocate seems so easy that he comes to esteem it as rather a natural gift than the result of teaching. Even if he has learned the principles of evidence, he cannot apply them with the facility needful for the emergencies of a *viva voce* examination. Hence it is, that the equity courts are so reluctant to avail themselves of the powers recently conferred upon them. Both judges and counsel must have some nisi prius training before they can comfortably face the witness box; and until they can do that, they will not be very anxious to depart from the ancient ways, and arrive at the truth by the short and plain path that has been opened to them.

Mr. N. F. Edwards, the chancery clerk to Messrs. Philpot and Greenhill, solicitors, of Gracechurch street, has just published a very sensible pamphlet on this subject in the form of a Letter to Lord Lyndhurst, containing some excellent suggestions for the improvement of the mode of taking evidence, and generally for the administration of justice in the Court of Chancery. He commences with a graphic description of the worthlessness, or worse, of evidence by affidavit, which he, after extensive experience, asserts to be "neither more nor less than a very partial and artistic reflex of facts from the distorted mirror of professional astuteness." One of its characteristics is "a warm, and too frequently an unscrupulous, coloring of truth." "There is not," he says, "even a pretence that the affidavit discloses the whole truth, as known to the witness. It professes simply to be a narrative of such parts of the truth as are favorable to the party using it." He adds: "It is not too much to say, that the court itself holds out, by its recognized practice, the utmost encouragement to the perversion of truth by this kind of testimony;" and he concludes emphatically thus: "It is difficult to say whether the *suppressio veri* or the *suppressio falsi* be the prevailing element in such evidence."

Mr. Edwards attributes the reluctance of the bench and bar to abandon the dishonest affidavit system, to the same cause as we have suggested above — conscious incapacity to deal with *viva voce* testimony. "All men," he says, "conversant with the Court of Chancery, know the extreme reluctance with which judges and counsel are induced to have an oral examination in court. And unfortunately, so far as the experiments have gone, the result can scarcely be deemed satisfactory." The experienced chancery clerk "will not positively aver" — we do — "that as at present constituted, the chancery bar cannot elicit the truth from a subtle and mendacious witness." And his conclusion is thus stated: "It is extremely natural, therefore, that this unfitness — or perhaps, more courteously speaking, this undeveloped fitness — of bench and bar, to extract the truth by oral testimony, should lead to the notorious unwillingness of both to resort to it."

Mr. Edwards entertains still greater objections to the examination before the examiners, which he asserts to "combine within itself every possible defect which can attach either to written or oral testimony, without a single redeeming quality of either."

The practical man submits that the only certain cure for these evils is an entire change in the mode of taking evidence — in fact, he would assimilate it entirely to the practice of the common law courts; all evidence should be taken *viva voce*, except in special cases, where special circumstances justify the exception. The bill and answer should be simply pleadings. He should have four assistant chancellors, or judges of fact, and they should be itinerant, and the parties should be empowered to have the aid of a jury in any case.

For the further details of this scheme, we refer our readers to the pamphlet. It attacks an evil universally acknowledged by the profession; it proposes the obvious remedy; but then that remedy substantially converts an equity court into a nisi prius court.

The result of the whole review points to that fusion of the practice of the courts, if not of the courts themselves, to which all recent reforms have tended, and which must be the ultimate consequence of further changes necessitated by the changes already made.

The Dignity of our Courts. In a recent number of the Law Times appeared an article in defence of the distinctive costume of the English barrister — the wig and gown, which it seems has lately been the subject of attack in "democratic newspapers," and of irreverent ridicule by the audacious *Punch*, who is no respecter of persons, or wigs either. The following description of the style of the American tribunals may amuse our readers — it did us:

"A friend who has recently returned from the United States, describes their courts of justice as being entirely wanting in that dignity which Europeans are accustomed to associate with judicial tribunals. There is about them an aspect more like that of the judge and jury club, than of a real tribunal, really dealing with men's actual lives, liberties, and fortunes. The judges loll in their chairs, rock themselves during the argument, sometimes put their feet upon the bench, sometimes smoke, and *always hawk and expectorate.* The counsel occasionally pull off their coats, and appear in their shirt sleeves; they talk in a free and easy strain; the argument is a familiar chat. * * * Here we see in action precisely what our courts would become, if the aspirations of the writers in Punch and the democratic newspapers were to be gratified. Who shall say how

much of the fillibustering propensities of the Americans, their sublime contempt for the rights of neighbors, their love for lynch law, the submission of their courts to the vagaries of popular prejudice, are due to this — that the American tribunals have no ceremonials."

It is strange the writer should have forgotten to enumerate the national amusement of whittling among the little recreations of the bench. And if he is at all familiar with the works of his countryman, Bon Gualtier, he should have remembered the reported case of Dodge and Fixings, wherein the opinion of the court was delivered by Mr. Justice Lynch,

> "Who as he gave his sentence stern to those who stood beneath,
> Still with his gleaming bowie knife did slowly pick his teeth."

The Unanimity of Juries. With great regret we have to record the rejection of Lord Campbell's excellent bill for more rationally regulating the verdicts of juries in civil actions. The overwhelming arguments in favor of the proposed alterations were not met by argument — for they are, in truth, unanswerable — but only by the old appeal to prejudice. "The present form of trial by jury," said the Lord Chancellor, "has existed for 500 years, with no complaint until our own time." The reply to this is, that the increased intelligence of juries has made actual unanimity an impossibility; and therefore it is unwise to maintain the mere pretence of it. A further objection was addressed to the fears of the unthinking. If you abolish unanimity in civil trials, you must do so in criminal trials; for the reasons that require the one will justify, if not demand, the other. This is not merely a fallacy; it is false. The reasons are *not* the same, but precisely the reverse. The reason for requiring unanimity in a criminal case is this, that it being a rule in the administration of our law that a doubt shall prevail in favor of a person accused of crime, if one man out of twelve entertain a reasonable doubt, and objects to a conviction, the prisoner ought not to be convicted. In civil cases no such rule exists, because they are questions not merely to be answered by "aye" or "nay," but involving complicated issues, on which differences of opinion are inevitable. To compel a unanimous verdict in such cases by the infliction of bodily torture, is not to produce unanimity, in fact, but only to force the dissentient minority to violate their consciences to save their healths. * *

That the time has ripened to the practicable and compulsory adoption of such a measure, none can reasonably doubt. The case which elicited the statement of the above intention from Lord Campbell was a remarkable instance of the absurdities which must, and always do, arise, whenever a hobby is driven to death, or a sound principle of politics is carried, or attempted to be carried, in practice, to the full extent of its abstract theory. The unanimity of jurors is a vision from Utopia. Does any sane man think in his heart that it is humanly possible to get any dozen, or even one-half dozen men to think exactly alike, and to form the same just conclusion from the same sound premises, in any one of the disputed questions of facts which come daily before our courts? Practically, on all juries, we believe, some two or three sharp and conscientious men attend to evidence, weigh its conflict, ponder the law as laid down by the judges, and arrive for the most part — rather by a happy instinct than by any abstruse ratiocination — at an honest and sensible verdict. The other nine or ten either have no opinion of their own, and have tried to form none; or, having tried, have become hopelessly muddled, and have given up the attempt long before the case is over. As the two or three thinking men

suggest, so the nine or ten non-thinkers are for the most part only too ready to act. "I say ditto to Mr. Burke," was the customary and only remark in his place, of some worthy but inarticulate parliamentary supporter of that great man. So, for the most part, says a British jury to its one or two leaders: "Save us, gentlemen, the trouble of thinking about matters which we do not understand, and in which we have no interest, and let the verdict be as you please, either for Tweedledum or Tweedledee. Shall we say for Tweedledum? Let it be so. Or rather for Tweedledee? Exactly as you please." "For whom shall we say, plaintiff or defendant? I want something to eat," was the anxiously deliberative sentiment of a country juryman not long since, after a careful summing up from a judge in a difficult case.

Doubtless there is much laxity of conscience — perhaps actual or constructive perjury — in these matters; unless it be thought, as we think it, too harsh a measure of criticism to deal such hard terms to decisions in controversies which the arbitrators often cannot understand, if they would, but which — sometimes at least — they will not understand where they can. But the system works well enough, and indeed admirably, as long as the nine or ten dummies follow their two or three leaders. But when these leaders split, and form opposite factions; or when even one obstinate and impracticable blockhead kicks resolutely back when he is gently reasoned forward, the difficulty becomes serious — in fact, intolerable and absurd. One fool or one knave, especially if endowed with a strong stomach, can set public justice at defiance. In the great trial of the seven bishops, the one court sycophant alone held out for a verdict of guilty till his fellow jurors were at extremity; and yielded only at last to the persuasion that at least one of them had stronger physical powers of endurance. — *Law Times, Apr.* 2 *and Dec.* 24.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1859.	Returned by
Atkins, Charles H.	Malden,	April 19,	Wm. A. Richardson.
Baldwin, James W.	Cambridge,	" 2,	" " "
Blake, Charles B.	Ashfield,	Feb. 14,	Charles Mattoon.
Bugbee, Jedediah	Millbury,	April 14,	Henry Chapin.
Butterfield, Francis M. (1)	S. Reading,	" 20,	Wm. A. Richardson.
Cavanaugh, Daniel	Charlestown,	" 20,	" " "
Cleaves, N. P.	Boston,	" 5,	Isaac Ames.
Cornell, Wm. M.	"	" 4,	" "
Curtis, Samuel S. (2)	"	" 19,	" "
Daniels, Edwin T. (3)	Somerville,	" 27,	" "
Dyer, Benjamin	Truro,	" 2,	J. M. Day.
Green, Joseph A. (3)	Boston,	" 27,	Isaac Ames.
Hair, Charles N.	Worcester,	" 15,	Henry Chapin.
Hobbs, John S.	Boston,	" 25,	Isaac Ames.
Howes, Prince	Dennis,	" 9,	J. M. Day.
Kaulback, Wm. J.	Roxbury,	" 4,	George White.
Ladd, John I.	Groveland,	" 20,	George F. Choate.
Leland, Emerson	Boston,	" 9,	Isaac Ames.
Lewis, Franklin H. (4)	Roxbury,	" 12,	George White.
Medbery, Edwin J. (5)	Lynn,	" 27,	George F. Choate.
Minot, Charles E. (2)	Roxbury,	" 19,	Isaac Ames.
Morcombe, Frederick T.	Malden,	" 26,	Wm. A. Richardson.
Morse, Harvey	Foxboro',	" 5,	George White.
Newell, George W.	Lawrence,	" 21,	George F. Choate.
Paul William, (5)	Lynn,	" 27,	" " "
Pickens, Ebenezer	Middleboro',	" 16,	Wm. H. Wood,
Powell, Douglass S.	Washington,	May 3,	Jas. T. Robinson.
Preble, Francis	Boston,	April 11,	Isaac Ames.
Proctor, Charles	Roxbury,	" 18,	George White.
Reed, John P.	E. Bridgewater,	" 6,	Wm. H. Wood,
Roberts, Smith M. (1)	S. Reading,	" 20,	Wm. A. Richardson.
Robinson, Thomas L. (4)	Roxbury,	" 12,	George White.
Russell, Josiah H.	W. Cambridge,	" 29,	Wm. A. Richardson.
Sampson, Oscar H. (2)	Boston,	" 19,	Isaac Ames.
Simpson, James E.	"	" 11,	" "
Smith, Caleb A.	Salem,	" 23,	George F. Choate.
Squire, James C.	Boston,	" 29,	Isaac Ames.
Stanwood, Louisa M.	Salem,	" 6,	George F. Choate.
Stover, Henry D.	Boston,	" 12,	Isaac Ames.
Taylor, Amos A.	Warwick, (formerly Lowell,)	" 13,	Charles Matoon.
Thayer, John P.	Boston,	" 19,	Isaac Ames.
Tobey, Wm. W. (2)	"	" 19,	" "
Whittaker, Abner N.	Lawrence,	" 20,	George F. Choate.
Wilson, Wm. H.	Williamstown,	" 12,	Jas. T. Robinson.

FIRMS.

(1) Roberts & Butterfield.
(2) Tobey, Sampson & Co.
(3) Daniels & Green.
(4) "Copartners." Firm not stated.
(5) Wm. Paul & Co.